(1) Supreme Court, U.S.
FILED

01 744 NOV 21 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

EUGENE SCHRODER; EDWIN PETROWSKY; R. RUSSELL GRIDER; and WESLEY MYERS,

Petitioners,

v.

GEORGE W. BUSH, President of the United States; ANN M. VENEMAN, United States Secretary of Agriculture; PAUL H. O'NEILL, United States Secretary of the Treasury; and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

WALKER F. TODD
Counsel of Record
Attorney at Law
1164 Sheerbrook Drive
Chagrin Falls, Ohio 44022
(440) 338-1169
Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

124pp

QUESTIONS PRESENTED

Petitioners, a group of four farmers residing in Colorado, New Mexico, and Kansas, brought an action against the United States for an injunction against farm foreclosures until parity pricing principles, declared to be the underlying law of U.S. agriculture in 1933 and never repealed or suspended, were enforced in the United States. They also sought a declaratory judgment regarding the continuing validity and effect of farm parity, which they argued was the principal component of a four-part compensatory scheme for market conditions in agriculture enacted in the mid-1930s to validate the regulatory taking of U.S. farmers' production rights under the Agricultural Adjustment Act of 1933. 7 U.S.C. Section 601. They argue that the taking continues, that neither parity nor other components of the four-part scheme are enforced for the benefit of U.S. agriculture even though the powers at issue were delegated for the principal benefit of agriculture, together with other key economic sectors, and that these powers were delegated permanently and unconstitutionally, without intelligible principles by which they may be reviewed, and in some instances without submission to political review through the congressional appropriations process. The Tenth Circuit nevertheless held that the district court ruled properly in dismissing the action below for (a) raising nonjusticiable political questions and (b) failing to state a cause of action on which relief could be granted, the relief requested raising matters of (principally) executive branch discretion.

QUESTIONS PRESENTED – Continued

The questions presented are:

I. Whether the enforcement of laws already on the statute books, the factual basis of the relief requested here, raises nonjusticiable political questions, as distinguished from the typical political question in which one party or another seeks adoption of a novel policy;

II. Whether the subject matter of the amended complaint below raises issues that are so involved with executive branch discretion, especially in foreign policy matters and their application to U.S. domestic agriculture, that the federal courts should not and cannot grant forms of relief that invade such discretionary areas; and

III. Whether it is constitutional, on its face or as applied, for Congress to delegate permanently to the executive branch, without statutory articulation of intelligible principles for the delegation or statutory subjection of the delegation to political review through the appropriations process, subject matters that the U.S. Constitution textually confides to Congress alone (or in one instance, a shared power of the executive and legislative branches that effectively is exercised by the executive branch alone).

STATEMENT PURSUANT TO RULE 29.6

Petitioners Eugene Schroder, Edwin Petrowsky, R. Russell Grider, and Wesley Myers each and all state that they are suing the United States in the present action in their individual capacities and that none of them and none of their farming interests is or has been since the commencement of the present action a subsidiary or an affiliate of any publicly owned corporation. None of them is the owner of more than a ten percent interest in any corporation. No publicly owned corporation has a financial interest in the outcome of this petition for certiorari.

TABLE OF CONTENTS

Page

Questions Presented i

Statement Pursuant to Rule 29.6 iii

Table of Contents iv

Table of Authorities vi

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved ... 1

Statement of the Case 2

1. Positive Statement of the Petitioners' Case ... 2

2. Statement of the Appellate Case: Petitioners' Case for Review 13

3. Note on Federal Jurisdiction 16

Reasons for Granting the Writ 18

I. The Decision Below Grants the Executive Branch Unfettered Discretion to Regulate Domestic Economic Activity in the Name of Foreign Affairs 21

A. Conduct of Foreign Affairs Impinges on Domestic Agricultural Economy 21

B. The Nondelegation Principle Is Violated ... 23

II. Prudential Abstention Principles Said to Be Embedded Within the Nonjusticiable Political Question Doctrine Prove on Closer Inspection to Be Inapplicable to Petitioners' Case, but Tenth Circuit Will Buttress Other Misled Circuits on This Issue 26

TABLE OF CONTENTS – Continued

Page

III. This Court Can and Should Grant the Forms of Relief Requested 27

IV. The Tenth Circuit Has Misconstrued Petitioners' Takings Claim, Which Is a Statutory or Regulatory Takings Claim Analogous to the *Lucas* Case 28

V. Conclusion 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Baker v. Carr, 369 U.S. 186 (1962) 14, 19, 26

Barlow v. Collins, 397 U.S. 159 (1970) 20

Butler v. United States, 297 U.S. 1 (1936) 20

Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948) 26

Dames & Moore v. Regan, 453 U.S. 654 (1981) 27

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) 20

Goldwater v. Carter, 444 U.S. 996 (1979) 24

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 8, 14, 25

Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) 20, 28

INS v. Chadha, 462 U.S. 919 (1983) 14, 19, 26

Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986) 25

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 21, 28, 29

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 30

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 14, 19, 26

TABLE OF AUTHORITIES – Continued

Page

Nixon v. United States, 418 U.S. 683 (1974) 17

Parker v. Brown, 317 U.S. 341 (1943) 20, 28

Schroder v. Bush, 263 F.3d 1169 (10th Cir. 2001) .. *passim*

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 9, 18, 19, 21, 24

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) 20

Whitman v. Amer. Trucking Ass'n, Inc., 531 U.S. 437, 120 S.Ct. 903 (2001) 8, 14, 19, 25

Wickard v. Filburn, 317 U.S. 111 (1942) 20, 29

Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizures), 343 U.S. 579 (1952) 17, 27

U.S. CONSTITUTION

Article I, Section 1 1

Section 7 1

Section 8, Clause 2 1

Clause 3 ..... 1, 23

Clause 5 ..... 1, 8, 23

Section 9, Clause 7 ..... 1, 8

Article II, Section 1, Clause 1 ..... 1, 8, 23

Section 2, Clause 2 ..... 1, 8, 21

Article IV, Section 4 1

Amendment V 1, 13, 16, 28

Amendment XIV, Section 1 ..... 1, 13, 16, 28

TABLE OF AUTHORITIES – Continued

Page

STATUTES

5 U.S.C. Section 702 ..... 2, 16, 17

7 U.S.C. Section 291 (Capper-Volstead Act) 10

7 U.S.C. Section 292 10

7 U.S.C. Section 601 (Agricultural Adjustment Act – AAA) 2, 3, 29

7 U.S.C. Section 602 3

7 U.S.C. Section 613 3

7 U.S.C. Section 1301 ..... 3, 12

7 U.S.C. Section 5671 4

7 U.S.C. Section 7301 (Freedom to Farm Act of 1996) 3, 4, 7, 12

12 U.S.C. Section 225a 22

12 U.S.C. Section 241 22

12 U.S.C. Section 355 22

15 U.S.C. Section 1 (Sherman Anti-Trust Act of 1890) 9

15 U.S.C. Section 18 9

15 U.S.C. Section 1022c 4

19 U.S.C. Section 1351 (Trade Agreements Act of 1934) 2, 8, 9

28 U.S.C. Section 1254 (1) 1

28 U.S.C. Section 1331 ..... 2, 16

28 U.S.C. Section 1491 (Tucker Act) 15

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. Section 2401 ..... 15, 16, 30

28 U.S.C. Section 2409a 15, 16, 30

31 U.S.C. Section 5301 (Thomas Amendment of AAA) 4, 5, 6

31 U.S.C. Section 5302 (Gold Reserve Act of 1934) 4, 5, 6, 7, 17

31 U.S.C. Section 5304 ..... 5, 6

50 U.S.C. Section 1701 (IEEPA) 2

50 U.S.C. Sections 1701-1706 (IEEPA) 27

Former Mexican Debt Disclosure Act of 1995 (expired 1997) 5

TREATISES AND OTHER AUTHORITIES

Published

Elizabeth Becker, *$88 Billion Farm Bill Wins Approval of Senate Panel*, N.Y. Times, Nov. 16, 2001, at A-18 12

Alexander M. Bickel, *The Least Dangerous Branch* (2d ed. 1986) 18

Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* (4th ed. 1996) 24

Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (1990) 24, 25, 26

TABLE OF AUTHORITIES – Continued

Page

Letter, Secretary of the Treasury Robert Rubin to House of Representatives Speaker Robert Livingston (R.-Lou.), June 23, 1998, in CMRE Monograph No. 54, at 16 (*see*, Schwartz reference below for Monograph No. 54) 6

Arthur M. Schlesinger, Jr., *The Coming of the New Deal* (1959) 16

Anna J. Schwartz, *Time to Terminate the ESF and IMF* and *Declaration of Anna J. Schwartz, in* Walker F. Todd, ed., *Time to Abolish the International Monetary Fund and the Treasury's Exchange Stabilization Fund: Documents on Their Origins, Consequences, and Failures, With a Roadmap to Abolition* 4-27, 28-34, Monograph No. 54 (Dec. 1998), Comm. for Monetary Research & Educ. (CMRE) 7

Unpublished

Randy Cook, History of Parity, Sept. 29, 2000 3

Ed Petrowsky, On Flour Mills in Kansas, Oct. 19, 2000 10

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Kane, J.) dismissing petitioners' complaint (Appendix ["Pet. App."] 17a-18a) is unpublished at this writing. The ruling by the court of appeals (per Ebel, J., joined by McWilliams and Brimmer, JJ.) affirming (Pet. App. 1a-16a) is published at 263 F.3d 1169. There are no subsequent hearings or opinions.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on August 24, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions relevant to this petition are as follows: In Article I (congressional powers), section 1 (legislative power); section 7 (origin of revenue bills); section 8, clauses 2 (borrowing money), 3 (regulation of interstate and foreign commerce), and 5 (coining and regulating value of money and of foreign coin); and section 9, clause 7 (appropriations). In Article II (executive powers), section 1, clause 1 (executive power) and section 2, clause 2 (treaty power). In Article IV (general powers), section 4 (guarantee or republican form of government). Among the Amendments, number 5 (due process and taking clauses) and number 14 (civil rights), section 1 (privileges and immunities, due process, and equal protection clauses). The pertinent constitutional texts are reprinted in the Appendix at 19a-21a.

The principal set of statutes relevant to this petition is the Agricultural Adjustment Act of May 12, 1933, as

amended (7 U.S.C. Section 601, *et seq.*), together with associated agricultural statutes, of which pertinent portions are reprinted in the Appendix at 22a-51a. Jurisdictional statutes cited either in the court of appeals opinion or petitioners' briefs below and referred to here include the Administrative Procedure Act (5 U.S.C. Section 702), general federal jurisdiction under 28 U.S.C. Section 1331, and various portions of Title 28, of which pertinent portions are printed in the Appendix at 22a, 62a-67a. Money and banking statutes relevant to this petition are various provisions of the Federal Reserve Act from Title 12 (Pet. App. at 51a-53a) and the Gold Reserve Act of 1934 from Title 31 (Pet. App. at 67a-71a). Antitrust and national policy goals statutes relevant to this petition are from Title 15 (Pet. App. at 54a-58a). Provisions of the Trade Agreements Act of 1934, as amended (19 U.S.C. Section 1351), that are relevant to this petition are reprinted in the Appendix at 58a-62a. Provisions of the International Emergency Economic Powers Act (50 U.S.C. Section 1701, *et seq.*) that are relevant to this petition are reprinted in the Appendix at 71a-78a.

STATEMENT OF THE CASE

1. Positive Statement of the Petitioners' Case

Petitioners, since the inception of their actions leading to the filing of the complaint and amended complaint in the district court, consistently have made the entirety of the following argument, which is the positive statement of their case:

During the perceived national economic emergency in early 1933, executive branch authority to promulgate extraordinary orders for the regulation of the domestic U.S. economy in peacetime was founded on a World War I wartime statute, the Trading With the Enemy Act of 1917. Doubts about the president's peacetime authority to issue the bank holiday order on March 6, 1933, and related orders were to be resolved by congressional passage of resolutions supporting those orders on March 9,

1933. The national economic emergency was extended to U.S. agriculture by the Agricultural Adjustment Act of May 12, 1933, as amended (AAA). 7 U.S.C. Section 601, *et seq.* (Pet. App. at 22a-51a). This emergency, as applied to domestic U.S. agriculture, never has been allowed to expire. *Compare* 7 U.S.C. Section 613 (AAA ends whenever the president or secretary of agriculture says that it ends, Pet. App. at 28a) *with* 7 U.S.C. Section 7301 (list of statutes suspended or repealed by the "Freedom to Farm Act" of 1996, including *none* of the statutes cited in this petition, Pet. App. at 48a-51a). The continued regulation of U.S. farmers' production rights constituted and still constitutes a statutory and regulatory taking of a private property right for which just compensation has to be paid if the taking is to be constitutional, either on its face or as applied.

In lieu of direct monetary compensation for the 1933 taking of farmers' production rights, ample authority documents that Congress authorized the executive branch to offer farmers a four-part compensatory scheme intended to create market conditions in agriculture conducive to the establishment of pricing parity. 7 U.S.C. Section 602 (a)(1) (Pet. App. at 26a). The first of the four parts of that scheme, parity, was to be calculated according to formulas set forth in 7 U.S.C. Section 1301 (a) (Pet. App. at 29a-32a), essentially based on a comparison of the index of farm prices received vs. costs of farmers' inputs for the base period 1910-1914. *Id.* at Section 1301 (a)(1)(B). The parity provisions of the AAA have been amended many times, including a 1949 restatement that is the underlying law of parity today. *See, e.g.*, 7 U.S.C. Section 1301 (a)(1)(G) (Pet. App. at 31a). Subsequent farm bills enacted every four or five years essentially have been mere *suspensions* of parity or, as one authority on parity explained it, "alternative means of reaching parity": In the absence of enactment of a new farm bill, the underlying parity provisions of the AAA (in this case, 1949 parity) automatically become the operative law of the land in agriculture. *See*, Randy Cook, History of Parity,

Sept. 29, 2000 (unpublished), *in* Appendix for Plaintiffs' (Petitioners') Appellate Brief (this case), at 17-24, filed in 10th Cir., Oct. 29, 2000. Parity is still referred to as a national goal for agriculture. 15 U.S.C. Section 1022c (C)(ii) (Pet. App. at 57a). Parity still is the basis for the compensatory formula for U.S. farmers adversely affected by trade embargoes implemented by the executive branch in pursuit of foreign policy goals. 7 U.S.C. Section 5671 (b)(1)(C), (b)(2) (Pet. App. at 47a-48a). This statute was enacted in 1979, and 15 U.S.C. Section 1022c was amended as recently as 1990. If parity is no longer the law of the land, having expired with either the 1938 revision of the AAA or the post-1955 train of intermediate-term farm bills that culminated in the Freedom to Farm Act of 1996 (7 U.S.C. Section 7301, Pet. App. at 48a-51a), as critics of the Petitioners' lawsuit contend, then how does one explain these statutes? Moreover, a series of U.S. Supreme Court decisions from the 1930s to the present moment (cited in connection with this argument in Reasons for Granting the Writ below) also has confirmed the currency of parity as the underlying agricultural law of the land by reference to it.

The second part of the four-part compensatory scheme for agriculture from the mid-1930s is foreign exchange regulation. Under 31 U.S.C. Section 5301 (Pet. App. at 67a-68a), originally part of the Thomas Amendment of AAA (May 27, 1933), the President is authorized to require the Secretary of the Treasury to enter agreements with the Federal Reserve Banks and the Board of Governors to conduct open-market operations in support of Treasury objectives if U.S. foreign commerce is adversely affected by instability in the value of foreign coins and currency. Later, on January 30, 1934, Congress enacted the Gold Reserve Act, now codified at 31 U.S.C. Section 5302 (Pet. App. at 69a-70a), to authorize the Secretary of the Treasury, subject to the President's approval, to operate the present Exchange Stabilization Fund (ESF) with respect to foreign exchange market interventions.

It appears that originally loans to foreign countries by the ESF were not contemplated. Indeed, other federal departments, such as Commerce or State, or agencies, such as the former Reconstruction Finance Corporation or the Agency for International Development, made such loans, but practices evolved between the Treasury and the Federal Reserve since about 1960 (including Federal Reserve funding of the ESF's loans outside the congressional appropriations process) that eventually (1977-1978) gave rise to congressional restrictions on ESF loans. *See, e.g., id.* at Section 5302 (b) and (c) (Pet. App. at 69a-70a); former Mexican Debt Disclosure Act of 1995, codified following this section, expired in 1997 (Pet. App. at 70a). Section 5304 (Pet. App. at 71a) authorizes the Secretary of the Treasury to issue any necessary regulations under both Sections 5301 and 5302.

The sticking point in this set of statutes, originally enacted in the full flowering of the President's near-dictatorial powers under the First New Deal, is the provision that, subject to the President's approval, the ESF

> is under the exclusive control of the Secretary [of the Treasury], and may not be used in a way that direct control and custody pass from the President and the Secretary. Decisions of the Secretary are final and may not be reviewed by another officer or employee of the Government.

Id. at Section 5302 (a)(2) (Pet. App. at 69a) (part of original statutory language, never amended). The Federal Government argues that this language means that no court may review actions of the ESF and that Congress also receives reports about ESF activity only by grace of the executive branch, not by any statutory or constitutional right.[1] A more appropriate interpretation of this set of

---

[1] Originally established under two-year emergency statutes, the ESF was made permanent in 1945. In June 1998, after the original Mexican Debt Disclosure Act of 1995 had expired and following press reports of new ESF loan

statutes is that (1) they should be construed together, 31 U.S.C. Sections 5301-5304 (Pet. App. at 67a-71a); (2) the Treasury cannot evade review of agency action (in this case, for an agency that existed before the first Administrative Procedure Act was enacted in 1940) merely by failing to issue appropriate regulations; (3) the "sole and unreviewable control of the President and Treasury" language for the ESF is unconstitutional on its face and reasonably should be interpreted to save its constitutionality by allowing the federal courts to review the agency's actions; and (4) in exercising appropriate authority over the ESF under the relevant statutes, the President and Secretary of the Treasury should take note of market conditions in U.S. agriculture rationally and demonstrably caused by the depreciation of particular foreign currencies and coins from their normal standards of value.

This much rationally appears to be comprehended within the existing ESF statutes: It cannot be argued credibly in a constitutional republic that the President and the Secretary of the Treasury may use the ESF as personal piggy banks of foreign exchange in the nature of

---

commitments to various East Asian countries that had been encountering foreign payments difficulties since the summer of 1997, members of Congress attempted to enact an amendment of 31 U.S.C. Section 5302 limiting the authority of the ESF to make loans to foreign countries without the prior, explicit approval of Congress to a maximum term of six months and a maximum amount of $1 billion. Secretary of the Treasury Robert Rubin sent a letter for the executive branch to House of Representatives Speaker Robert Livingston (R.-Lou.) on June 23, 1998, threatening to ask the President to veto the appropriation for the Treasury and the U.S. Postal System if this amendment passed. The amendment failed in the House, 221-195. Thus, the Treasury continues to assert unreviewable, unilateral, unappropriated authority for the ESF that renders its structure unconstitutional on its face and its operations unconstitutional as applied.

executive branch slush funds. *See*, Anna J. Schwartz, *Time to Terminate the ESF and IMF* and *Declaration of Anna J. Schwartz, in* Walker F. Todd, ed., *Time to Abolish the International Monetary Fund and the Treasury's Exchange Stabilization Fund: Documents on Their Origins, Consequences, and Failures, With a Roadmap to Abolition*, 4-27, 28-34, Monograph No. 54 (Dec. 1998), Comm. for Monetary Research & Educ. The basic argument of Petitioners with respect to the ESF is that U.S. foreign exchange policy since 1995 has been conducted without regard to the interests of U.S. agriculture. However, the nature of the extraordinary authority over foreign exchange delegated to the President and the Secretary of the Treasury, 31 U.S.C. Section 5302 (a)(2) (Pet. App. at 69a), and the general deregulation of the production controls side of U.S. agriculture under the Freedom to Farm Act of 1996, 7 U.S.C. Section 7301 (Pet. App. at 48a-51a), objectively require the President and the Secretary of the Treasury to take the interests of U.S. farmers into account in managing foreign exchange and in structuring post-currency-devaluation International Monetary Fund (IMF) bailouts of major foreign competitors of U.S. agricultural producers, like those for Brazil (1999-2000), Argentina (2000-2001), and Turkey (2001).

Petitioners contend that the ESF, both as created and as administered, is unconstitutional, both on its face and as applied. The statute originally creating the ESF as an emergency measure, subsequently renewed at two-year intervals, might have strengthened some of the modern jurisdictional objections to any case challenging the ESF's creation by providing for expiration of the authority delegated to the President and the Secretary of the Treasury before the next succeeding session of Congress. Such an agency clearly could be reformed within the political operations of the executive and legislative branches and, moreover, by the time any court challenge to the ESF reached the U.S. Supreme Court, the matter probably would have been moot if the authorizing statute were

allowed to expire without renewal. However, the permanent creation and existence of the ESF as it stands, not subject to annual appropriations except for its incidental operating expenses (*see*, U.S. Constitution, Art. I, Sec. 9, cl. 7, in Appendix at 19a), an entity that lacks articulated intelligible principles for its operation, and exercising exclusively a power (the regulation of foreign exchange) that in the text of the Constitution is reserved to Congress alone (Art. I, Sec. 8, cl. 5, in Appendix at 19a) and is nowhere given to the executive branch unless it be within the general executive powers (Art. II, Sec. 1, cl. 1, in Appendix at 19a), raises all the issues of the non-delegation doctrine discussed in Justice Thomas's concurring opinion in *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 437, 121 S.Ct. 903, 919-920 (2001) (Pet. App. at 79a-80a), citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 408 (1928) (on the "intelligible principle" doctrine for congressional delegations of power).[2]

The third component of the 1930s four-part compensatory scheme for U.S. agriculture that is at issue in Petitioners' case is the Trade Agreements Act of June 12, 1934, as amended (19 U.S.C. Section 1351, Pet. App. at 58a-62a). This Act, also passed by the First New Deal Congress, created the executive branch Office of the U.S. Trade Representative (OTR). Previously, trade agreements with foreign countries were viewed as treaty matters and typically were negotiated by representatives of both the executive branch and the U.S. Senate, reflecting the shared treaty-making power. U.S. Constitution, Art. II, Sec. 2, cl. 2. (Pet. App. at 20a). One of the possibly unforeseen consequences of the Act creating the OTR was that the operations of that office became swept into the general rubric of the unilateral executive branch conduct of foreign affairs, a doctrine that acquired great currency

---

[2] The Petitioners' case in both the district court and the court of appeals was commenced, and oral argument in the court of appeals was held, before the *Whitman* case was decided.

for the first time in the mid-1930s, albeit without foundation in previous constitutional jurisprudence or actual practice. After all, what precedents does Justice Sutherland cite for his famous dictum in *Curtiss-Wright*? *See, e.g, United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). In granting the President and the OTR extraordinary authority to make executive trade agreements with the practical legal effect of treaties in derogation of the constitutionally shared treaty-making power, Congress stated explicitly that the President, "in the course of negotiating any foreign trade agreement under this section [19 U.S.C. Section 1351], should seek advice from representatives of industry, *agriculture*, and labor." (Emphasis added.) *Id.* at Section 1351 (f) (Pet. App. at 62a). Petitioners contend that, especially in post-1993 trade agreements (supremely exemplified in the North American Free Trade Agreement with Mexico in 1993), the interests of U.S. farmers were *not* consulted, or were ignored if they were. The issue of statutory interpretation raised is whether the statute just cited, expressing the "sense of the Congress," is a binding condition on the President's exercise of the OTR authority delegated by this statute. If it is, then like parity and foreign exchange regulation before it, this third element of the 1930s four-part compensatory scheme for the statutory and regulatory taking of U.S. agricultural production rights has been abandoned.

The fourth element of the four-part compensatory scheme is regulation of market concentrations in agriculture. The Sherman Anti-Trust Act of 1890 was amended in 1937 specifically to increase the authority of the U.S. Department of Justice to initiate anti-trust enforcement actions against persons whose activities tended to increase market concentrations in agriculture. 15 U.S.C. Sections 1, 18 (Pet. App. at 54a-56a). Section 18 of this title in particular prohibited acquisitions of shares of stock or assets of other persons where the effect of the acquisitions would be "substantially to lessen competition, or to tend to create a monopoly." At the same time, 7

U.S.C. Sections 291 and 292 (Pet. App. at 22a-25a) essentially prohibited farmers from combining to raise prices.

In the thinking of the creators of anti-trust policy in the 1930s, it would have made little sense to promise farmers parity, on the one hand, and then to allow sellers of farmers' inputs, or buyers of their outputs, to concentrate their resources through mergers and acquisitions and thereby regain pricing power over farmers that the promise of parity was intended to prevent. Still, through governmental inaction, at both the federal and the state levels in recent decades, sellers of farmers' inputs have been allowed to concentrate their resources so that farmers have far fewer choices about brands of equipment, seeds, fertilizers, etc., to purchase and of places to purchase them than only a few decades ago. Similarly, farmer producers selling the main commodity crops that have been the subjects of extensive U.S. Department of Agriculture regulation and subsidies since the 1930s increasingly confront a paucity of buyers. In Kansas, for example, a major wheat-producing state, only 18 flour mills bid for grain today, and only two of them could be regarded as truly independent of the four large, multinational grain companies that control the U.S. grain trade. *See*, Ed Petrowsky, On Flour Mills in Kansas (unpublished), Oct. 19, 2000, in Appendix for Plaintiffs' Appellate Brief (this case) at 25, filed October 29, 2000.

Worst of all, concentrations in production techniques due to the spread of contract farming and direct competition (some of it subsidized by U.S. government programs) with U.S. farmers from offshore production facilities owned or controlled by the four largest multinational grain companies have presented U.S. farmers with unforeseen difficulties that arise from the failure of official anti-trust policy enforcement. Thus, the fourth and final element of the compensatory scheme for the taking of U.S. farmers' production rights also has failed as an outgrowth of official U.S. governmental policy.

What is the upshot of the positive statement of the Petitioners' case? It is fundamentally a takings case, but a

takings case of a sort that the federal courts do not usually encounter. It involves a statutory or regulatory taking of a production right, not of legal title to the land that the Petitioners own (other than through foreclosures). They seek no monetary damages or relief.

The Petitioners seek only (a) a moratorium on farm foreclosures, originally requested to be enforced by an injunction, and (b) a declaratory judgment stating that parity remains the overriding federal law of the land regarding U.S. agriculture until Congress amends or repeals the relevant statutes. They seek no new appropriations of funds for agricultural relief or support programs. In the courts, they seek no reallocation of appropriated funds.

The moratorium on farm foreclosures, pending full implementation of parity pricing principles or other policy actions amounting to renewed co-ordination aimed at implementing the four-part scheme to restore orderly marketing conditions in agriculture, is a form of relief that the federal courts could grant. If there were questions regarding the authority of the federal courts to order a moratorium affecting defendants who were not represented in the case, then the relief could be confined to only foreclosures arising from federally funded farm mortgages (*e.g.*, those issued by the Farm Credit System or the Farmers Home Administration). The next broader area of relief via moratorium, arguably still within the circle of the federal courts' jurisdiction, would affect all farm mortgages that are federally insured or guaranteed or issued by federally chartered institutions. This would involve national banks and holders of federally insured or guaranteed farm mortgages, for example.

The court of appeals expressed concern at oral argument about issuing an injunction that would affect adversely persons not represented by attorneys from the U.S. Department of Justice, and it is conceded that the court's concern might be well-taken. However, all federally funded farm mortgages ultimately flow through either the Treasury or the Department of Agriculture or

both, and issuers and holders of federally insured or guaranteed farm mortgages have been exposed to similar debt restructurings since the 1986 rescue of the Farm Credit Administration. The next outward ring of defendants-respondents affected by a moratorium ordered by the federal courts might be federally insured financial institutions, regardless of chartering authority. Federally insured banks, savings and loans, and credit unions are used to filing reserve requirement reports with the Federal Reserve by virtue of their eligibility for federal deposit insurance. A safe dividing line within this category might be requiring all federally insured depository and lending institutions to be subject to the moratorium but exempting uninsured but eligible institutions.

Regarding a declaratory judgment on parity, the statutory basis for such a declaration by the federal courts is clear. Any new farm bill enacted by Congress next year (the current farm bill, Freedom to Farm Act of 1996, expires in September 2002) must either put in place some compensatory scheme in place of parity pricing principles, or the 1949 parity legislation will revert to being the law of the land in agriculture. *Compare* 7 U.S.C. Section 1301 (a)(1)(E)-(G) (Pet. App. 30a-31a) *with* 7 U.S.C. Section 7301 (Pet. App. 48a-51a). Current press reports (mid-November 2001) indicate that both the House of Representatives and the Senate will reject the reforms proposed by the White House and the ranking minority member of the Agriculture Committee, Senator Richard Lugar (R.-Ind.), and will adopt instead a five-year farm bill (Senate version) or a ten-year farm bill (House version) that "places no limits on subsidies to America's wealthiest farmers and increases spending for conservation and food stamps." Elizabeth Becker, *$88 Billion Farm Bill Wins Approval of Senate Panel*, N.Y. Times, Nov. 16, 2001, at A-18. The federal courts are competent to grant the forms of relief requested in the courts below.

2. Statement of the Appellate Case: Petitioners' Case for Review

The U.S. District Court for the District of Colorado dismissed Petitioners' complaint as raising nonjusticiable political questions and for requesting forms of relief that could not be granted (implicitly, as purportedly requiring judicial invasions of areas of executive branch discretion where the courts have given the executive broad leeway, as in the conduct of foreign affairs). Following oral argument before a three-judge panel in Denver, Colorado, on March 12, 2001, the Tenth Circuit affirmed, noting that the Petitioners must seek relief for the issues raised in the complaint (generally, the current plight of the small family farmer) in the elected branches of government. *Schroder v. Bush*, 263 F.3d 1169, 1171-1172 (10th Cir. 2001) (Pet. App. at 1a, 2a-5a). In addition, the Tenth Circuit found that the Petitioners' takings claim (U.S. Constitution, Amends. 5 and 14, cl. 1, in Appendix at 20a-21a) failed, having been presented inadequately on appeal, and also that it was time-barred. 263 F.3d 1169, 1176-1177 (Pet. App. at 1a, 14a-16a).

The court of appeals' holdings merit this Court's immediate review because each and every one of the grievances cited in the Petitioners' amended complaint continues unabated and unrelieved to the present moment (mid-November 2001). Left undisturbed, the Tenth Circuit's opinion will become a precedent for unilateral, unreviewed, and unreviewable executive branch conduct of foreign *commercial or banking* operations (through the Treasury's ESF), a power that the Constitution explicitly delegates to Congress alone (regulating the value of foreign exchange). At risk is the principle that the executive can do almost anything, almost anywhere, no matter how thoroughly commercial, escaping both judicial review and the checks and balances intended to be provided through the annual or biennial appropriations process, usurping the powers of Congress in the process, as long as the executive plausibly can characterize

its activity as having anything at all to do with the conduct of foreign affairs. Nondelegation principle issues of the type discussed in *Hampton* and *Whitman, supra,* are raised squarely in this case regarding both the foreign trade agreements (OTR) and foreign exchange regulation (ESF) powers and were briefed in both the district court and the Tenth Circuit, but the Tenth Circuit did not reach these issues in its opinion. *See, e.g.,* Plaintiffs' (Petitioners') Appellate Brief (10th Cir.) at 26-28, filed October 29, 2000.

The court of appeals' holdings further merit this Court's immediate review because the Tenth Circuit's opinion will be added to the federal government's litany of inapposite case citations on the proper interpretation of the doctrine of nonjusticiability of political questions and on the proper classification of cases falling within the parameters of that doctrine. Most of the cases cited in the government's briefs and in the Tenth Circuit's opinion on this point did *not,* in their *holdings,* reflect prudential judicial *abstention* from affairs constitutionally confided to the elective branches of government; in fact, in most of those cases, including the granddaddies of them all, the U.S. Supreme Court actually reached decisions on the merits. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). *Baker v. Carr,* 369 U.S. 186 (1962). *INS v. Chadha,* 462 U.S. 919 (1983). The government's argument, inferentially sustained by the Tenth Circuit, is that if, within the decision of a political question case, *any* rule of decision is cited *whatsoever* that points toward "prudential abstention," then that reference overrides *any* contrary or stronger reasoning process or rule by which this Court ultimately found that it was required to reach a decision on the merits and in fact did so. But that is *exactly* what happened in the leading cases just cited. The merits were reached in each instance.

The court of appeals' holdings merit this Court's immediate review because the Tenth Circuit misconstrued the nature of the relief sought, which never was for an injunction of broader scope than the relevant court's jurisdiction would support (*e.g.,* a moratorium on all farm

foreclosures within the territory of the Tenth Circuit). If the Petitioners' case succeeded, other plaintiffs in other districts or circuits could file analogous petitions of their own, if they wished, but the Petitioners did not ask any federal court to overreach its own jurisdiction. Similarly, the precise targets of such an injunction (*i.e.*, all federally funded farm mortgages vs. all federally insured or guaranteed farm mortgages vs. all farm mortgages from any source) clearly were intended from the pleadings to be whatever set of institutions would comport with the court's jurisdiction and the identity of the entities plausibly said to have their interests in this litigation represented by the U.S. Department of Justice (a category that clearly would include all federally funded farm mortgages and, probably, all federally insured or guaranteed farm mortgages).

The court of appeals' holding also merits this Court's immediate review because it misconstrues Petitioners' takings claim. *Schroder v. Bush*, 263 F.3d 1169, 1176-1177 (Pet. App. at 1a, 14a-16a). Ordinarily, a takings claim involving a property rights interest receives heightened scrutiny because of the fundamental nature of the life, liberty, or, in this instance, property interest involved. The Tenth Circuit apparently reasoned that property rights claims nearly always state a claim for money damages or their equivalent, which emphatically was not the case here. Monetary claims arising from property, the Tenth Circuit apparently reasoned, must be filed under a different set of federal jurisdictional statutes related to the Tucker Act, 28 U.S.C. Section 1491 (Pet. App. at 63a-64a). Also, the Tenth Circuit found Petitioners' takings claim time-barred under 28 U.S.C. Section 2401 (Pet. App. at 65a). Finally, the Tenth Circuit might have been led astray into the morass of Tucker Act cases by inapposite analogy to 28 U.S.C. Section 2409a (Pet. App. at 65a-67a), which deals with quiet title actions against the United States and jurisdiction of other types of real property claims where the matter at issue is *actual legal title* to real estate. Instead, Petitioners' case involves statutory or

regulatory actions precluding unfettered use and enjoyment of real property interests, which is what AAA actually accomplished, instead of the actual nationalization of all U.S. farm land, which some New Dealers allegedly advocated. Upon inspection, the Tucker Act generally applies to claims for monetary damages arising from tort and contract claims against the United States. It is far from clear that jurisdiction in the U.S. Court of Claims under the Tucker Act would have been appropriate for statutory and regulatory takings raising constitutional issues (*e.g.*, the nondelegation principle) and seeking *no monetary relief* in this instance. Similarly, the statutes of limitations prescribed in 28 U.S.C. Sections 2401 and 2409a (Pet. App. at 65a-67a) simply are inapplicable to claims of the Petitioners' types, which do not involve federal tort or contract claims, or federal takings of actual legal title to land (other than via mortgage foreclosures).

3. Note on Federal Jurisdiction

The bases cited for federal jurisdiction in the court of first instance, here the U.S. District Court for the District of Colorado, were 28 U.S.C. Section 1331 (Pet. App. at 63a) and 5 U.S.C. Section 702 (Pet. App. at 22a). The first statute covers general federal questions. The factual basis asserted for the Petitioners' case is the failure of the four-part compensatory scheme for the federal statutory and regulatory taking of U.S. farmers' production rights in the AAA. The four-part scheme was intended to be the "just compensation" that would save the constitutionality of the taking. *See, e.g.*, Arthur M. Schlesinger, Jr., *The Coming of the New Deal* 35-36 (1959). *See also*, U.S. Constitution, Amend. V (due process and takings clauses) (Pet. App. at 20a) *and* Amend. XIV, Sec. 1 (privileges and immunities and due process clauses) (Pet. App. at 20a-21a).

The second statute, 5 U.S.C. Section 702, confers jurisdiction on the federal courts for claims requesting

declaratory or injunctive relief and not monetary damages (the precise forms of relief requested here) and waives the federal government's claim of sovereign immunity in appropriate cases. At issue in the district court (although not addressed in the Tenth Circuit's opinion) was the federal government's contention that the first proviso of this statute denies jurisdiction if another statute (i.e., 31 U.S.C. Section 5302 (a)(2) [Pet. App. at 69a]) expressly precludes judicial review. Essentially, the government's argument was that the ESF's governing statute precludes judicial review by language stating that decisions of the President and Secretary of the Treasury in this area "may not be reviewed by any other officer or employee of the Government." Petitioners' reply essentially is to the effect that federal judges ordinarily are not considered "officers or employees of the Government," which is language evoking the executive, not the judicial, branch of the federal government, and that preclusion of judicial review is so extraordinary a constitutional step that statutes of that nature should express judicial preclusion explicitly and not merely by implication.

The other principal jurisdictional argument in the district court involved the propriety of Petitioners' invocation of 5 U.S.C. Section 702 (Pet. App. at 22a) regarding either the President, who generally is held not to be the head of an agency subject to judicial review under this statute, or the heads of cabinet departments (also claimed not to be agencies subject to judicial review). Petitioners conceded that jurisdiction over the President is difficult and usually is reserved only for grand cases like *Nixon v. United States*, 418 U.S. 683 (1974) (the presidential tapes case), but Petitioners argued that, as *Nixon* shows, such jurisdiction is not completely unknown. Also, Petitioners contended that, with respect to cabinet departments (Treasury and Agriculture) and agencies like the ESF and OTR that predated the Administrative Procedure Act, their official actions may be reviewed by the federal courts and in fact are reviewed by the courts. In *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizures* case), 343

U.S. 579 (1952), for example, the named party defendant in an injunctive action not unlike the present one was the Secretary of Commerce, who was charged with implementing the contested seizures of the struck steel companies.

In any event, the Tenth Circuit decided the Petitioners' case on other grounds (especially the political question doctrine) and did not reach a decision on the narrow jurisdictional points. Inferentially, however, both the district court and the Tenth Circuit might be viewed as having found a sufficient statutory basis for jurisdiction in this case because, unless Petitioners are profoundly mistaken in this regard, a federal court ordinarily would find that it has no statutory jurisdiction first, before moving on to decide jurisdictional issues on grounds like the political question doctrine. Indeed, Petitioners have the impression that the political question doctrine normally is couched in terms of refraining from the exercise of jurisdiction that otherwise might attach due to prudential concerns about impinging on decisions properly conferred on the elected branches of government. *See, e.g.*, Alexander M. Bickel, *The Least Dangerous Branch* 125-126, 184 (2d ed. 1986).

REASONS FOR GRANTING THE WRIT

The Petition for Certiorari should be granted for four reasons initially suggested in the second numbered subdivision of the Statement of the Case above. *First*, the Tenth Circuit's holding in the Petitioners' case below tends to confirm the executive branch in the unfortunate and unconstitutional trend originally set in motion by Justice Sutherland's dictum in *Curtiss-Wright* that any action arising from *domestic* economic activity, no matter how purely and inherently domestic, may be regulated and its product seized by the executive in pursuit of allegedly foreign affairs goals, in which the executive allegedly is supreme and unchallengeable. Under the *Curtiss-Wright* doctrine, the President allegedly exercises

a "very delicate, plenary and exclusive power . . . as *the sole organ of the federal government* in the field of international relations." (Emphasis added.) 299 U.S. 304, 320. A second reason for granting the writ that is comprehended within the first reason is the violation of the *nondelegation principle* that is raised by the delegation of sole authority over the operations of the ESF and the OTR to the executive branch, permanently in both cases, without an articulated intelligible principle (ESF) or with an arguably intelligible principle that is violated constantly without consequences (OTR), and without congressional review through the appropriations process (ESF), while the Constitution explicitly delegates these operations to the legislative branch alone (regulation of foreign exchange and foreign commerce). *See*, Justice Thomas's concurrence in *Whitman*, 531 U.S. 457, 121 S.Ct. 903, 919-920 (Pet. App. 79a-80a).

The *second* overall reason for granting the writ is the district court's and Tenth Circuit's misapplication of the "prudential abstention" rules of the political question doctrine to a case of the Petitioners' type: Most of the standard political question cases involve advocacy of enactment of a particular policy approach where an opposing or no policy apparatus already exists. But in this case, Petitioners neither advocate that a new policy be adopted nor ask the federal courts to legislate; rather, they advocate that policies already declared be pursued and that statutes already enacted be enforced. The four-part compensatory scheme described in the first numbered subdivision of the Statement of the Case above is not a mere legislative or policy proposal: It is emphatically already the law of the land for U.S. agriculture, and it is not being enforced. Thus, the standard form of political question analysis is inapplicable to Petitioners' case, even ignoring the misinterpretations of what this Court actually said and did in the standard litany of political question cases: *Marbury*, 5 U.S. (1 Cranch) 137; *Baker*, 369 U.S. 186; *Chadha*, 462 U.S. 919; and progeny.

The *third* overall reason for granting the writ is the district court's and Tenth Circuit's misinterpretation of their capacities to grant the forms of relief requested, an injunction against farm mortgage foreclosures and a declaratory judgment to the effect that parity pricing principles continue to be the underlying agricultural law of the land. This Court's upholding of farm mortgage foreclosure moratoria is precedented. *See, e.g., Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398 (1934) (validation of a Minnesota state mortgage foreclosure moratorium statute). Regarding the requested declaratory judgment, this Court has issued rulings on the constitutionality of AAA many times, generally sustaining it. *See, Butler v. United States,* 297 U.S. 1 (1936) (processing tax under AAA was invalid, but parity pricing principle itself was not so far invalidated that Congress could not re-enact AAA). *But see,* later cases in which the AAA (including, parity itself) has been vindicated. *Wickard v. Filburn,* 317 U.S. 111 (1942) (validity of AAA in intrastate commerce). *Parker v. Brown,* 317 U.S. 341 (1943) (upholding validity of the so-called single plan for parity). *Barlow v. Collins,* 397 U.S. 159 (1970) (Secretary of Agriculture's regulations affecting assignability of parity payments to tenant farmers could be reviewed in the federal courts). *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 188-189 (1994) (various Massachusetts restrictions on out-of-state milk were unconstitutional burdens on interstate commerce). *Glickman v. Wileman Bros. & Elliott, Inc.,* 521 U.S. 457, 461-462 (1997) (marketing ordrs for fruits and nuts are still valid exercises of regulatory authority under AAA). Thus, there are ample precedents for both of the requested forms of relief.

The *fourth* and final overall reason for granting the writ is that the Tenth Circuit's opinion misconstrues Petitioners' takings claim as a claim for money damages (which it emphatically is not) and applies statutory analysis to the claim that would be appropriate only for tort or contract claims under the Tucker Act and also applies

statutes of limitation to the claim that would be appropriate only for actual governmental takings of legal title to property. The taking in Petitioners' case is a statutory or regulatory taking of a subset of property rights regarding use (production rights on the property) instead of an actual taking of legal title. An apposite analogy is the line of reasoning of this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, he has suffered a taking). Brief explanation of these four reasons for granting the writ follows.

I. The Decision Below Grants the Executive Branch Unfettered Discretion to Regulate Domestic Economic Activity in the Name of Foreign Affairs

A. Conduct of Foreign Affairs Impinges on Domestic Agricultural Economy

Justice Sutherland's famous dictum in *Curtiss-Wright*, 299 U.S. 304, 320, regarding the President's "very delicate, plenary and exclusive power" in foreign affairs should have been challenged more vigorously from the outset in light of the prior tradition of shared responsibility with Congress, at least regarding the making of treaties. U.S. Constitution, Art. II, Sec. 2, cl. 2 (Pet. App. at 20a) (treaties require the concurrence of two-thirds of the Senate). To the extent that modern cases have built on this dictum, they have created a situation in which the executive branch increasingly and solely makes economic policy decisions affecting *domestic* economic activity, which normally would be outside the scope of foreign affairs. In this instance, decisions of the executive affecting both prices paid and prices received by U.S. farmers, principally implemented through the Treasury and the Department of Agriculture, but to a significant extent through the OTR also, have been raised by the federal government's briefs to the unquestionable status of holy writ. Unfortunately, the Tenth Circuit, while apparently

sympathetic to the plight of small family farmers, has elected not to question the nexus between the executive's conduct of foreign affairs and the prices paid and received by farmers. This issue was briefed fully for the courts below: The United States has pursued a bifurcated policy since about 1995 in which the interests of domestic farmers are deliberately sacrificed for larger foreign policy goals, sometimes disguised as the liberalization of international trade, which this bifurcated policy is not.

On one hand, open-market operations of the Federal Reserve Banks, conducted through the Federal Open Market Committee, have led to an increase of the U.S. dollar index quoted on the New York Board of Trade and daily in the financial sections of major newspapers, a rough proxy for the foreign exchange value of the dollar, from about 95 in 1995, roughly the beginning of the current phase of U.S. farmers' economic difficulties, to about 116 in mid-November 2001. That index was already above 100 (1973 is the base year) in 1999, when the Petitioners sent a notice of the causes of their complaint to the relevant federal departments and agencies, including the Executive Office of the President. By March 2001, the time of oral argument in this case in the Tenth Circuit, the index stood at 112. On the Federal Reserve's role, *see* 12 U.S.C. Sections 225a, 241, and 355 (Pet. App. at 51a-54a). In briefs below, the government has contended that the President is the federal official ultimately responsible for the nation's monetary policy, which is not entirely correct respecting the Federal Reserve's role in domestic monetary policy but might be correct (statutorily, even if not constitutionally) respecting the foreign exchange value of the dollar, at least since 1934.

On the other hand, since 1995, the Treasury, operating through the ESF (which it totally controls) and the IMF (in which it holds an 18 percent blocking veto, or de facto control), has extended tens of billions of dollars of bailout funds to foreign countries devaluing their currencies as a condition of obtaining the IMF's assistance. Several of those countries are direct competitors of U.S.

farmers, including Mexico (fruits, vegetables, and cattle), Argentina (corn, wheat, sheep, and cattle), Brazil (soybeans and cattle), and Turkey (wheat). Other countries have had major currency devaluations but without ESF or IMF assistance, including Canada (wheat) and Australia (sheep, wheat, corn, and cattle). The use of the Treasury's funds to assist these countries amounts to forcing U.S. farmers to subsidize their biggest foreign competitors. Also, the OTR has negotiated major trade agreements since 1993 with several countries with similar competitive profiles: Chile (fruits and vegetables), Colombia (fruits and cut flowers), and Mexico (see above). In these instances, tariff barriers against foreign food and fiber imports into the United States are reduced, but the dollar appreciation offsets any advantage that U.S. producers might expect to obtain from being able to export to the other country. Thus, foreign affairs intrude into the domestic U.S. agricultural economy.

B. The Nondelegation Principle Is Violated

The statutory delegations of sole conduct of the operations of the ESF and the OTR to the executive branch violate the general principles of separation of powers and specific constitutional provisions. The Constitution, Art. I, Sec. 8, cl. 5 (Pet. App. at 19a), delegates the regulation of foreign exchange, implicitly treating it as a commercial activity, to Congress, not the executive. The regulation of foreign trade (Art. I, Sec. 8, cl. 3, in Appendix at 19a) also is delegated to Congress in the same clause that delegates the regulation of domestic trade. It is an overreaching of executive branch power to treat these matters as exclusively executive and somehow falling under the rubric of the general executive power, as the government contended in the courts below. *See*, U.S. Constitution, Art. II, Sec. 1, cl. 1.

Both instances, foreign exchange and foreign trade, involve matters that are inherently legislative and that

become executive only by legislative acquiescence. Unfortunately, that acquiescence frequently occurs. To be traditionally constitutional, these delegations should require an initial reporting line of responsibility to Congress, not to the executive, periodic appropriations (this is done for the OTR but not for the ESF), and either a predetermined cessation date or a procedure by which Congress could reclaim these powers. However, these functions are delegated permanently to the ESF and OTR, with inadequate standards of accountability and review to Congress, and outside the appropriations process for the ESF. The foreign affairs power should not include commercial powers that constitutionally belong to Congress instead. *See generally,* Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (1990), especially at 38-100, 134-149. *See also,* Richard H. Fallon, Jr., Daniel J. Meltzer, and David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 289-293 (4th ed. 1996) (hereinafter *Hart & Wechsler*). Both Koh and *Hart & Wechsler* are properly critical of the general judicial acquiescence in the executive's power grab for control of foreign commercial matters under the rubric of foreign affairs, an expansion of the *Curtiss-Wright* doctrine.[3] The gist of these citations from Koh and *Hart & Wechsler,* and the cases discussed there is clearly antithetical to the citations relied upon in the Tenth Circuit's opinion on these points, *Schroder v. Bush,* 263 F.3d 1169, 1174-1176. *See, e.g., Goldwater v. Carter,* 444 U.S. 996 (1979) (Justice Rehnquist ruled on the merits that the president

---

[3] Koh writes, *supra,* at 94:

> Among government attorneys, Justice Sutherland's lavish description of the president's powers is so often quoted that it has come to be known as the " '*Curtiss-Wright,* so I'm right,' cite" – a statement of deference to the president so sweeping as to be worthy of frequent citation in any government foreign affairs brief.

could not terminate a treaty already approved by Congress); *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986) (Supreme Court reviewed on the merits Secretary of Commerce's decision in a Japanese whaling case allegedly having a delicate posture for Japan-U.S. foreign relations).

Koh, *supra*, at 148, summarizes the argument for granting the writ of certiorari on this first point as follows:

> [T]he trend toward executive insulation from judicial review in foreign affairs is a relatively recent development, which finds little support in our constitutional traditions. Since the founding of the National Security Constitution [1947], the courts have played a pivotal role in maintaining the constitutional equilibrium of the national security system. That role has required judges to police the boundaries of the branches' authority in foreign affairs to maintain the constitutional principle of balanced institutional participation. Particularly when Congress legislates a framework statute governing executive decisions, those decisions should remain fully subject to judicial review. Thus, the recent foreign-affairs cases in which courts have abstained from such review ultimately betray not doctrinal fidelity, but reflexive timidity.

Finally, on this first reason for granting the writ, the *permanent* delegation to the executive of legislative branch powers textually committed to Congress, combined with inadequate or no articulated standards of review of executive branch action (ESF) or minimally articulated standards that apparently are consistently ignored (OTR) raises all the issues that Justice Thomas mentioned in *Whitman*, citing *Hampton*, 531 U.S. 457, 121 S.Ct. 903, 919-920 (Pet. App. at 79a-80a); 276 U.S. 394, 409. If this Court ever wished to deal with the clearest example of breach of the nondelegation doctrine, the Petitioners' case presents such an example.

II. Prudential Abstention Principles Said to Be Embedded Within the Nonjusticiable Political Question Doctrine Prove on Closer Inspection to Be Inapplicable to Petitioners' Case, but Tenth Circuit Will Buttress Other Misled Circuits on This Issue

The lower courts have misapplied the principle of prudential abstention and the doctrine of nonjusticiable political questions in Petitioners' case. *See, Schroder v. Bush*, 263 F.3d 1163, 1173-1176. First, the standard political question doctrine as articulated in the government's briefs and in the Tenth Circuit's opinion implies that contestants are merely seeking relief in a judicial forum that, because of conflicting interests with other members of society, contestants should seek in a political forum instead, through one or more of the elected branches of government. In fact, Petitioners have sought and continue to seek political relief for the plight of U.S. farmers, including themselves, but they also seek enforcement of policies already decided upon and statutes already enacted. Parity and the four-part compensatory scheme already have been enacted – Petitioners have nothing to advocate in the legislative branch except commissions of inquiry to find out why the standing policy has not been implemented. Thus, the interests ordinarily served by a policy of prudential judicial abstention are absent here.

Regarding the misinterpretation and misapplication of the political question doctrine generally, critics of the doctrine observe that, in fact, this Court usually has actually reached the merits of the cases most often cited in favor of abstention. In *Marbury, Baker*, and *Chadha*, the Court decided the cases on the merits. 5 U.S. (1 Cranch) 137; 369 U.S. 186; 462 U.S. 919. Koh observes, *supra*, at 135, that throughout the early development of modern national security practices, this Court almost always reached the merits of the cases. This aspect began to change only with the issuance of dicta in *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), asserting the nonreviewability of executive branch foreign

affairs matters, one year into the Cold War. But the contrary principle (presumption in favor of reviewability) persisted through *Youngstown*, 343 U.S. 579 (1952), suffering a severe setback only when *Dames & Moore v. Regan* was decided. 453 U.S. 654 (1981). Despite the obvious foreign affairs connection in *Dames & Moore* (regarding U.S. claims on Iran during the hostage seizures), this Court reached the merits and found that Congress had acquiesced so fully as to be deemed to have approved the President's actions there under the International Emergency Economic Powers Act (IEEPA). 50 U.S.C. Sections 1701-1706 (Pet. App. at 71a-78a). By the time *Chadha* was reached, *supra*, this Court still decided the case on the merits but basically prohibited Congress from exercising legislative control over various aspects of the President's control of foreign affairs. The important principle to be observed here is that the federal courts should entertain the Petitioners' case on the merits and should not decline to hear it on some mistaken notion that the merits never are reached in foreign affairs cases. On the contrary: Such cases frequently (perhaps usually) reach the merits, and this Court needs to say so to prevent the Ninth, Tenth, Eleventh, and D.C. Circuits from persisting in ruling that such cases should not reach the merits. *See, Schroder v. Bush*, 263 F.3d 1169, 1173-1176.

III. This Court Can and Should Grant the Forms of Relief Requested

This Court clearly has the capacity to issue an injunction prohibiting farm foreclosures, at least in the territory of the Tenth Circuit where all Petitioners reside, until the executive and legislative branches certify to the Court that they have reached a common position on farm foreclosures in light of other policies that Congress has approved and that the Executive Branch has implemented. Basically if in 1996 the production controls of AAA were lifted from U.S. agriculture under the Freedom to Farm Act, which largely was a congressional decision, it then made little or no sense for the Treasury (ESF) to undo the market competitiveness of U.S.

farmers by subsidizing imports of grains and other covered commodities and crops. Even if the ESF effected no such subsidy directly itself, the net effect of the Treasury's foreign exchange policies since 1995 has been to cheapen the price of imported goods and services and to drive up the dollar's value.

The unreconciled division of agricultural policy between Congress (running fast to fill the hole in domestic agricultural payments that executive branch policies have created) and the executive means that the ills of which Petitioners initially complained formally in 1999 will continue for the indefinite future. Under precedents such as *Blaisdell, supra*, 290 U.S. 398, this Court may validate mortgage foreclosure moratoria. Under precedents like *Parker*, 317 U.S. 341, this Court also may issue a declaratory judgment to the effect that parity is the law of the land, as well. The forms of relief requested below are within the capacity of this Court to grant.

IV. The Tenth Circuit Has Misconstrued Petitioners' Takings Claim, Which Is a Statutory or Regulatory Takings Claim Analogous to the *Lucas* Case

Perhaps led to this conclusion by the government's briefs, the Tenth Circuit's opinion misconstrues Petitioners' takings claims (5th and 14th Amendments) as claims for money damages, when they are in fact claims for injunctive and declaratory relief only. The statutes and cases cited apparently reflected a desire on the part of the Tenth Circuit for a more elaborate development of a takings argument in the case below. *See, Schroder v. Bush*, 263 F.3d 1169, 1176-1177. But, as was noted at oral argument in the Tenth Circuit, there never was a hearing in the district court, and, thus, only issues raised by the government were briefed responsively by Petitioners.

The Tenth Circuit noted that Petitioners' amended complaint contained references to the nature of the case as a takings claim at 6, 25-26. On appeal, Petitioners concentrated their energies in overcoming the district court's dismissal on

political question grounds and for failure to state a claim on which relief could be granted, there being no comment on the takings claim in the district court's opinion.

From the inception of the case, as the first numbered subdivision of the statement of the case above makes plain, Petitioners never argued that legal title to their property has been taken by the government. Rather, it was argued, throughout most of the AAA era, farmers' production rights (a distinctive form of property right) have been taken. Regardless of how the taking occurred, it was supposed to be compensated, and there was a failure of compensation. The compensation was an elaborate, four-part scheme designed to restore orderly marketing conditions in agriculture, no part of which currently is being implemented as originally intended.

Because of the complexity of the compensation plan, Petitioners have always found in their public appearances that it was more important to explain the four-part compensation scheme under AAA than to explain the taking of farmers' property rights (emphasis on the compensation rather than on the taking). After all, it was argued, AAA, 7 U.S.C. Section 601 (Pet. App. at 25a), constituted the taking: The executive and legislative proclamation of a national emergency in agriculture and the impressment of agriculture with the national interest. What was taken then was farmers' production rights, thenceforth to be regulated closely by the federal government.

This Court has held that the taking of the right to use real property as one sees fit, especially for productive use, is nevertheless a taking even if legal title does not pass to the government. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). The sacrifice of economically beneficial uses to the common good constitutes a taking. That is exactly what befell U.S. agriculture on May 12, 1933: Nearly all economically beneficial use according to one's predilections in agriculture ground rapidly to a halt.

This Court's decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), signaled that there was nearly no end to the

level of federal interference in minutely local agricultural practices.

On its face, it appears that it would be impossible to fit the taking in Petitioners' case into the classic rubric of a tort or contract claim under the Tucker Act or a quiet title or other title action under 28 U.S.C. Sections 2401 and 2409a (Pet. App. at 65a-67a). The statutes of limitations for such claims are irrelevant to Petitioners' case.

Instead, Petitioners are stating an equitable claim for equitable relief. Where the wrong alleged is a constitutional violation (a taking in which there has been failure of agreed compensation – there is no parity, even though it is the law of the land) the request for equitable relief may be stated even decades after the onset of the taking if the lesson in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), were taken literally: "It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this." The constitutionality of the Bank of the United States had been in issue since its founding in 1791. Yet, 28 years after the fact, Chief Justice Marshall was willing to deal with the Bank's constitutionality as though it were freshly brought to his attention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WALKER F. TODD
Counsel of Record
Attorney at Law
1164 Sheerbrook Drive
Chagrin Falls, Ohio 44022
(440) 338-1169
Attorney for Petitioners

TABLE OF CONTENTS OF APPENDIX

PAGE(S)

Copy of Order Appealed From: Opinion of the United States Court of Appeals for the Tenth Circuit Decided and Filed August 24, 2001, Published as *Schroder v. Bush*, 263 F.3d 1169 (10th Cir. 2001) 1a

Copy of Order Appealed to Tenth Circuit: Order of the United States District Court for the District of Colorado Dated and Filed July 6, 2000, Unpublished 17a

PROVISIONS OF U.S. CONSTITUTION CITED

Art. I, sec. 1 ..... 19a

Art. I, sec. 7, cl. 1 ..... 19a

Art. I, sec. 8, cl. 2 ..... 19a

Art. I, sec. 8, cl. 3 ..... 19a

Art. I, sec. 8, cl. 5 ..... 19a

Art. I, sec. 9, cl. 7 ..... 19a

Art. II, sec. 1, cl. 1 ..... 19a

Art. II, sec. 2, cl. 2 ..... 20a

Art. IV, sec. 4 ..... 20a

AMENDMENTS TO U.S. CONSTITUTION CITED

Amend. V (due process and takings clauses) 20a

Amend. XIV, sec. 1 ..... 20a

TABLE OF CONTENTS OF APPENDIX – Continued

PAGE(S)

U.S. STATUTES CITED

5 U.S.C. Section 702 ..... 22a
7 U.S.C. Section 291 ..... 22a
7 U.S.C. Section 292 ..... 23a
7 U.S.C. Section 601 ..... 25a
7 U.S.C. Section 602 ..... 26a
7 U.S.C. Section 613 ..... 28a
7 U.S.C. Section 1301 ..... 29a
7 U.S.C. Section 1303 ..... 45a
7 U.S.C. Section 5671 ..... 46a
7 U.S.C. Section 7301 ..... 48a
12 U.S.C. Section 225a 51a
12 U.S.C. Section 241 ..... 52a
12 U.S.C. Section 355 ..... 52a
15 U.S.C. Section 1 ..... 54a
15 U.S.C. Section 18 ..... 54a
15 U.S.C. Section 1022c 57a
19 U.S.C. Section 1351 ..... 58a
28 U.S.C. Section 1254 ..... 62a
28 U.S.C. Section 1331 ..... 63a
28 U.S.C. Section 1491 ..... 63a
28 U.S.C. Section 2401 ..... 65a
28 U.S.C. Section 2409a 65a

TABLE OF CONTENTS OF APPENDIX – Continued

PAGE(S)

31 U.S.C. Section 5301 ..... 67a

31 U.S.C. Section 5302 ..... 69a

31 U.S.C. Section 5304 ..... 71a

50 U.S.C. Section 1701 ..... 71a

50 U.S.C. Section 1702 ..... 72a

50 U.S.C. Section 1703 ..... 75a

50 U.S.C. Section 1704 ..... 76a

50 U.S.C. Section 1706 ..... 77a

Concurring Opinion of Justice Thomas in *Whitman v. Amer. Trucking Ass'n, Inc.*, 531 U.S. 457, 121 S.Ct. 903 (2001) 79a

United States Court of Appeals,
Tenth Circuit.

Eugene **SCHRODER**; Edwin Petrowsky;
R. Russell Grider; and Wesley Myers,
Plaintiffs-Appellants,

v.

George W. BUSH, President of the United States;
Ann M. Veneman, United States Secretary of Agriculture;
Paul H. O'Neill, United States Secretary of the Treasury;*
and United States of America, Defendants-Appellees.

No. 00-1357.

Aug. 24, 2001.

Walker Fowler Todd, Chagrin Falls, OH, for Plaintiffs-Appellants.

Peter J. Krumholz, Assistant United States Attorney (*Thomas L. Strickland*, United States Attorney, with him on the brief), Denver, CO, for Defendants-Appellees.

Before *EBEL*, Circuit Judge, *McWILLIAMS*, Senior Circuit Judge, and *BRIMMER*,** District Judge.

EBEL, Circuit Judge.

---

* Pursuant to Fed. R.App. P. 43(c)(2), George W. Bush is substituted for William J. Clinton, President of the United States; Ann M. Veneman is substituted for Daniel R. Glickman, United States Secretary of Agriculture; and Paul H. O'Neill is substituted for Lawrence Summers, United States Secretary of the Treasury, as Defendants Appellees in this action.

** The Honorable Clarence A. Brimmer, Jr., United States District Judge for the District of Wyoming, sitting by designation.

Appellants are farmers or ranchers who live and work within the territorial boundaries of the Tenth Circuit and who seek declaratory and injunctive relief against the President of the United States, the United States Secretary of Agriculture, the United States Secretary of the Treasury, and the United States of America (collectively, "Appellees"). Appellants seek, in essence, an order requiring Appellees and their agents to maintain market conditions favorable to small farmers. The district court dismissed for lack of subject matter jurisdiction, writing, "The Complaint seeks to have this court determine political questions which are properly addressed [by] the elected branches of the government. This Court has no jurisdiction over the discretionary acts of either. Plaintiffs' remedies are at the polling place, not the courts." *Schroder v. Clinton*, No. 00-CV-154 K (D.Colo. July 6, 2000) (hereinafter "D.Ct. Order"). We agree that Appellants ask us to consider nonjusticiable political questions and that Appellants must seek relief from the elected branches of government. We therefore AFFIRM the district court's dismissal.[1]

---

[1] Deeply rooted ambiguity in the nature and justification of the political question doctrine has prevented clear classification of the appropriate type of dismissal in political question cases. *See* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d § 3534.3*, at 517-525 (2d ed. 1984) We agree with Wright & Miller's conclusion that, in the end, clear classification is immaterial: "[T]here is probably more room for confusion than benefit in attempting to analogize [political question dismissal] to dismissal for failure to state a claim, or to dismissal for lack of jurisdiction. Some cases will be appropriate for dismissal on the pleadings, others will require further development. . . ." *Id.* at 525; *cf.* Daniel O. Bernstine, *The Political*

BACKGROUND

A. *Plight of the Small Farmer in America*

Every branch of the federal government has recognized how difficult it is for small farmers to make a living by farming.[2] *See* William J. Clinton, State of the Union Address of January 27, 2000, *reprinted in* 2000 U.S.C.C.A.N. D7, 2000 WL 85684, *11 ("[D]roughts, floods, and historically low prices have made these times very bad for the [family] farmers."); S.J. Res. 171, 103rd Cong. (1994) (1994) (joint proclamation of "Small Family Farm Week") (stating "the plight of the small family farmer has been in jeopardy in recent times [and] many small family farms continue to operate in the face of financial and credit difficulties"); *Mulroy v. Block*, 574 F.Supp. 194, 195-96 (N.D.N.Y.1983) ("[I]n a time when this nation is experiencing the decline and threatened extinction of the individual farmer, it is particularly disturbing to see legislation such as this which will undoubtedly have a devastating effect on the small scale dairy farmers of this nation."); *In re Moeller*, No. 90-35017, 1990 WL 208617, at *1 (9th Cir. Dec.14, 1990) ("Appellants made

---

Question Doctrine: A Perspective on its Procedural Ramifications, 31 U. Kan. L.Rev. 115, 129-30 (1982) (concluding that dismissal for subject matter jurisdiction is appropriate if the claims fall within an established category of political questions or are frivolous, but that, otherwise, dismissal for failure to state a claim is appropriate).

[2] Indeed, three of the four Appellants have other jobs besides farming: Schroder is also a veterinarian; Petrowsky is also a nuclear engineer and aerial photographer; and Myers has also been a county sheriff.

spirited arguments before this court regarding the plight of family farmers who have successfully farmed the same land for generations. We sympathize with their concerns."). In a similar case from 1988, we acknowledged our awareness of "the serious plight of the family farmer in America. We sympathize with farmers struggling to secure their livelihoods and, more fundamentally perhaps, maintain their way of life." *Schroder v. Volcker*, 864 F.2d 97, 99 (10th Cir.1988).[3] A 1998 report from the United States Department of Agriculture demonstrates that, more than a decade after *Schroder*, times are still hard for small farmers in America: "Today, we have 300,000 fewer farmers than in 1979, and farmers are receiving 13 percent less for every consumer dollar. Four firms now control over 80 percent of the beef market. About 94 percent of the Nation's farms are small farms, but they receive only 41 percent of all farm receipts." Nat. Comm'n on Small Farms, U.S. Dep't of Agric., *A Time to Act: A Report of the USDA National Commission on Small Farms*, at 8 (Jan.1998).

We remain sympathetic to the plight of the small farmer, but we also remain in agreement with the judgment of both the district court in this case and the *Schroder* court thirteen years ago: "[W]e believe the issues

---

[3] Despite the superficial similarities in *Schroder v. Volcker* and *Schroder v. Volcker* of name and kind of case, *see* 864 F.2d at 98 ("Plaintiffs' claims constitute a broad scale attack against the agricultural credit system in particular, and the American banking and economic systems in general."), the two cases do not seem related. Appellants' first names in *Schroder v. Volcker* were Derral and Gladys, while the Schroder in this case is named Eugene.

raised by plaintiffs in this suit are basically political questions which must be resolved in the legislative arena." *Schroder*, 864 F.2d at 99.[4]

B. *Relief Sought by Appellants*

Appellants – Eugene Schroder from Campo, Colorado; Edwin Petrowsky from Pratt, Kansas; R. Russell Grider from Clovis, New Mexico; and Wesley Myers from Clovis, New Mexico – sought "a moratorium on farm foreclosures[5] and an order requiring the President, Secretary of the Treasury, Secretary of Agriculture, and their agents to control United States currency and to maintain market conditions so as to be favorable to American farmers." They admitted that controlling currency and maintaining favorable market conditions "would require

---

[4] Appellants acknowledge that they have sought relief via political channels. Despite their initial lack of success, we believe our constitutional system requires that they stay that course.

[5] In their Complaint, Appellants sought a moratorium on "all agricultural foreclosures and forced sales caused by lack of purchasing power parity." On appeal, however, they refined this prayer for relief to "a moratorium on *federally funded* farm foreclosures." We find the addition of no import, but even if we did, generally we will not consider new theories on appeal. *See Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1314 n. 4 (10th Cir.1998). This observation – that we generally refuse to consider new theories on appeal – applies with equal force to the other minor changes Appellants made to their request for relief on appeal. Because their requested relief, regardless of whether they requested it in their Complaint or Opening Brief, fits squarely within the political question doctrine, we do not labor over the discrepancies.

congressional or judicial review of agricultural product and marketing controls, bilateral trade agreements that affect U.S. agriculture, the activities of the Exchange Stabilization Fund, and enforcement of the anti-trust laws by the U.S. Department of Justice with respect to corporate competitors of family farmers. . . . " They sought a permanent injunction "requiring the Secretary of the Treasury and the U.S. Trade Representative . . . of the President to work together and cooperate in negotiating and implementing foreign trade agreements" that would benefit small farmers.

Appellants alleged that a national emergency in Agriculture was declared "on May 12, 1933, and has yet to be terminated 66 years later," and requested a declaratory judgment that "the state of National Emergency declared by Congressional Statute in 1933 still exists." They also demanded declaratory judgments that "sub-par agricultural commodity prices shall be allowed as an affirmative defense in any action for debt" and that "the event of the commonly quoted U.S. dollar index . . . rising above 95 shall be allowed as an affirmative defense or as a basis for a stay of proceedings for foreclosure [against any individual, non-corporate U.S. farmer]."[6]

---

[6] In addition, Appellants sought "a declaratory judgment that parity pricing principles are the law of the land." To support this claim, they rely on the Agricultural Adjustment Act ("AAA") of 1933. The Senate Report from the Food, Agriculture, Conservation, and Trade Act of 1990, however, explains that the Supreme Court invalidated the production control provisions of the 1933 Act, [so] Congress passed a second Agricultural Adjustment Act in 1938. . . . The Agricultural Act of 1949 amended the 1938 Act to establish a permanent authority for

S. Rep. No. 101-357, at 43-45 (1990). Thus, Appellants' reliance on the 1933 AAA is misplaced. Furthermore, as the Senate Report explained, over the years Congress has enacted successive suspensions of the alleged parity pricing requirement. Indeed, Appellants seem to acknowledge that the AAA of 1933 affords them no legal relief. At various points in their briefs Appellants complain about how Congress has enacted "conflicting" legislation that has permitted the Executive Branch to "pursue[ ] other policies antithetical to parity pricing principles."

Last, they contended the federal government has effected a taking without paying just compensation in violation of the Fifth Amendment.

DISCUSSION

A. *The Political Question Doctrine*

After reviewing Appellants' prayer for relief, we are convinced that the district court was correct to dismiss Appellants' claims as nonjusticiable political questions. Since it is a legal question, we review de novo the application of the political question doctrine. *See Stuart v. United States*, 813 F.2d 243, 246 (9th Cir.1987), *overruled on other grounds by United States v. Stuart*, 489 U.S. 353, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989).

---

parity-based price supports. However, since 1973, Congress has amended the 1949 Act regularly with legislation that expires after 4 or 5 years. Farm programs under these expiring authorities have become quite different from the parity-based programs of the 1930's and 1940's.

Prudence, as well as separation-of-powers concerns, counsels courts to decline to hear "political questions." *See Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Nixon v. United States*, 506 U.S. 224, 252-53, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (Souter, J., concurring in the judgment); Alexander M. Bickel, *The Least Dangerous Branch* 125-26, 184 (2d ed.1986).[7] When deciding whether issues present political questions, courts must make a "discriminating inquiry into the precise facts and posture of the particular case," for it resists "resolution by any semantic cataloguing." *Baker*, 369 U.S. at 217, 82 S.Ct. 691. As "there is no blanket rule," *id.* at 215, 82 S.Ct. 691, application of the doctrine must be made on a "case-by-case" basis, *id.* at 211, 82 S.Ct. 691.

The tangled roots of the political question doctrine stretch back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). *See id.* at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."); *see also generally id.* at 164-66. The most thorough explication of the doctrine was provided in *Baker v. Carr*, in which the Supreme Court gathered the doctrine's "analytical threads." 369 U.S. at 211, 82 S.Ct. 691. It wrote, in this well-known passage,

---

[7] To resolve this case we need not explore the underpinnings of the doctrine. We merely note that "it is uncertain whether the political question doctrine is constitutional, prudential, or both." Erwin Chemerinsky, *Federal Jurisdiction* § 2.6, at 149 (3d ed.1999).

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S.Ct. 691.

We have no doubt that this case presents textbook examples of political questions and thus that it was properly dismissed by the district court. The Constitution commits to Congress the regulation of domestic and foreign commerce, *see* U.S. Const. art. I, § 8, cl.3, the establishment of bankruptcy law, *see id.* cl.4, and the regulation of currency, *see id.* cl.5. To the President, the Constitution commits the "Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const. art. II, § 2, cl.2. "The Constitution confers a vast amount of power upon the political branches of the federal government in the area of foreign policy – particularly foreign commerce." *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1313 (11th Cir.2001) (gathering constitutional provisions and Supreme Court cases). The Supreme Court has recognized that "the President alone has the power to

speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 57 S.Ct. 216, 81 L.Ed. 255 (1936). "While the treaty power of the Executive expressly involves the participation of the Legislature, nowhere does the Constitution contemplate the participation by the third, non-political branch, that is the Judiciary, in any fashion in the making of international agreements. . . . " *Antolok v. United States*, 873 F.2d 369, 381 (D.C.Cir.1989) (opinion of Sentelle, J.). Besides this evidence of a textual commitment to the political branches of the regulation of domestic and foreign markets and currency, as well as the enactment of treaties and trade agreements, it is clear to us that Appellants' request that courts maintain market conditions, oversee trade agreements, and control currency – all to the advantage of small farmers – would require courts to make "initial policy determinations" in an area devoid of "judicially discoverable and manageable standards" and where "multifarious pronouncements by various departments" would lead to confusion and disarray. As the *Baker* Court explained, "The political question doctrine [is] a tool for maintenance of governmental order," 369 U.S. at 215, 82 S.Ct. 691, and this case exemplifies when that tool should be employed. Courts are ill-equipped to make highly technical, complex, and on-going decisions regarding how to maintain market conditions, negotiate trade agreements, and control currency. The political branches, in contrast, retain just this sort of institutional competence. *See Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948)

(explaining that foreign policy decisions "are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); *see also* Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 Va. L.Rev. 649, 659-60 (2000) (describing the political question doctrine in terms of the deference courts have chosen to afford to the Executive Branch).

When we turn to other aspects of Appellants' prayer for relief, *e.g.*, a moratorium on farm foreclosures[8] and oversight of the Justice Department's enforcement of anti-trust laws against agribusinesses,[9] we similarly find ourselves enmeshed in the *Baker* threads. Again, the Constitution commits to Congress the power to regulate domestic commerce and bankruptcies. *See* U.S. Const. art. I, § 8, cl.3 & cl.4. When and how banks may foreclose upon farms unquestionably falls within those powers, and nothing in existing bankruptcy law empowers us to act here. The Constitution requires the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and vests in the President the general "executive Power," *id.* § 1, cl.1. Thus, there is a textual commitment to the Executive Branch to enforce banking laws

---

[8] Presumably, this request for relief would have to be directed not against Appellees but against lending institutions holding mortgages on small farms. That group has not been named as a party.

[9] Similarly, Appellants did not name the Attorney General as a party.

and to exercise prosecutorial discretion in bringing antitrust suits against agribusinesses. *See United States v. Renfro*, 620 F.2d 569, 574 (6th Cir.1980) ("The decision of whether or not to prosecute . . . is a decision firmly committed by the constitution to the executive branch of the government. . . . [I]ntervention by the court in the internal affairs of the Justice Department would clearly constitute a violation of the Separation of Powers Doctrine."); *United States v. Am. Tel. & Tel. Co.*, 714 F.2d 178, 182 (D.C.Cir.1983) (recognizing prosecutorial discretion).

Furthermore, Article III limits courts to adjudicating cases and controversies, thereby precluding the sort of judicial oversight of the political branches in which Appellants invite us to engage. As the Supreme Court has observed,

> The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decision, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (quotation marks omitted).

Likewise, turning to Appellants' request for a declaratory judgment that a 1933 national emergency still exists and that low farm prices or a strong dollar are affirmative defenses to actions to collect debt or to foreclose on farm

property, Appellants in essence ask this court to re-formulate national policies because Appellants disagree with the policies instituted by the political branches. Indisputably, that is not the role of the Judiciary in our constitutional system.

Regarding the existence of another national emergency, in that case war, the Supreme Court has refused "to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands 'A prompt and unhesitating obedience.' " *Baker,* 369 U.S. at 213, 82 S.Ct. 691 (quoting *Martin v. Mott,* 25 U.S. (12 Wheat) 19, 30, 6 L.Ed. 537 (1827) (calling up of militia)). As with war, the need for finality and certainty is critically important to determining whether a Depression-era national emergency has ended, for many social programs hinged, directly or indirectly, on that determination. Indeed, Appellants contend that they have legal rights because the 1933 national emergency remains on-going. Again, lack of legal standards and the necessity for the federal government to speak with one voice militate in favor of leaving such declarations to the political branches.

Appellants' request that we declare the existence of affirmative defenses to actions for debt or foreclosure is nothing but a plea for the courts to legislate. Clearly, the Constitution commits this power to Congress and the President. *See INS v. Chadha,* 462 U.S. 919, 945, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) ("Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process."). Appellants present us with

no legal arguments as to why these affirmative defenses allegedly exist; they merely assert that the defenses should exist. Respect for the legislative process and separation of powers foreclose us from entertaining Appellants' suggestion. Deciding whether sound public policy recommends such affirmative defenses is "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217, 82 S.Ct. 691.

Appellants admit that "Executive Branch discretion would be invaded" if this court granted the relief they seek, but assert that it would be invaded "no further than appropriate[ ]." For the foregoing reasons, we disagree. Appellants ask us to invade inappropriately the provinces of both the Legislative and Executive Branches. This we decline to do.

B. *Takings Claim*

Appellants' takings claim fails. First, despite counsel's initial statement at oral argument that "this is a takings case," it is unclear whether Appellants properly presented this issue to this court on appeal. Appellants mentioned takings language in their Complaint, *see* Amended Complaint at 6, 25-26, but they discussed it only tangentially on appeal, failing either to cite takings cases or to develop any sort of argument. This is not sufficient to preserve the issue for appeal. *See Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1314 n. 4 (10th Cir.1998) ("[D]iscussing a theory only in a vague and ambiguous way below is not adequate to preserve issues for appeal.").

Buttressing our conclusion that Appellants failed to present a takings claim to the district court are Appellants' repeated assertions that "[they] seek no monetary damages . . . but, rather, seek only declaratory and injunctive relief." Opening Brief at 1; *see also* Amended Complaint at 4 ("[T]he relief requested is purely declaratory or injunctive."). Generally, the remedy for a governmental taking is just compensation. *See* U.S. Const. amend. V. Moreover, the district court's order makes no reference to such a claim. This court "should not be considered 'a second-shot' forum . . . where secondary, back-up theories may be mounted for the first time." *Tele-Communications, Inc. v. Comm'r*, 104 F.3d 1229, 1233 (10th Cir.1997).

Even if Appellants properly preserved a takings claim, that claim fails as premature. "[T]aking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 175, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Furthermore, Appellants brought their takings claim in the wrong court: "The Tucker Act provides jurisdiction in the United States Claims Court for any claim against the Federal Government to recover damages founded on the Constitution, a statute, a regulation, or an express or implied-in-fact contract." *Preseault v. I.C.C.*, 494 U.S. 1, 11-12, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990) (citing 28 U.S.C. § 1491(a)(1)). Appellants do not allege that they sought and were denied just compensation after bringing a Tucker Act claim in the United States Court of Claims. These facts support our conclusion that Appellants did not initially intend to make a takings

claim, but later decided to elevate that claim to a more central position on appeal.

Finally, were we to address Appellants' takings claim, we would find it time-barred. Appellants argue, "It is undisputed that agricultural property rights were subjected to a taking for public use on May 12, 1933." The general statute of limitations period for actions against the United States is six years. *See* 28 U.S.C. § 2401.

Consequently, we find that Appellants' takings claim fails.

CONCLUSION

We AFFIRM the dismissal of Appellants' complaint.

[Order of the District Court Appealed to the Tenth Circuit]

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Judge John L. Kane, Jr.

Filed July 6, 2000

Civil Action No. **00-AP-154**

EUGENE SCHRODER, EDWIN PETROWSKY, R. RUSSELL GRIDER, and WESLEY MYERS,

Plaintiffs,

v.

WILLIAM JEFFERSON CLINTON, President of the United States; DAN GLICKMAN, United States Secretary of Agriculture; LAWRENCE SUMMERS, United States Secretary of the Treasury; and THE UNITED STATES OF AMERICA,

Defendants.

ORDER

Kane, J.

On May 31, 2000, Defendants filed a Motion to Dismiss this civil action pursuant to Federal Rule of Civil Procedure 12(b)(1),(6). The matter has been fully briefed and oral argument would not materially assist in determining the issues presented.

Plaintiffs seek a moratorium on farm foreclosures and an order requiring the President, Secretary of the Treasury, Secretary of Agriculture, and their agents to

control United States currency and to maintain market conditions so as to be favorable to American farmers.

The Motion to Dismiss is **GRANTED** because this court lacks jurisdiction over the subject matter and can grant no relief. The Complaint seeks to have this court determine political questions which are properly addressed to the elected branches of the government. This Court has no jurisdiction over the discretionary acts of either. Plaintiffs' remedies are at the polling place, not the courts.

Case **DISMISSED**.

Dated at Denver, Colorado, this 6th day of July, 2000.

BY THE COURT:

[Signature]
JOHN L. KANE, JR.
SENIOR U.S. DISTRICT JUDGE

U.S. Constitution

Article I. Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 7.

All Bills for raising Revenue shall originate in the House of Representatives * * *

Section 8.

The Congress shall have Power * * *
[cl. 2] To borrow Money on the credit of the United States;
[cl. 3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
[cl. 5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures * * *

Section 9.

[cl. 7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Article II. Section 1.

[cl. 1] The executive Power shall be vested in a President of the United States of America * * *

Section 2.

[cl. 2] He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur * * *

Article IV. Section 4.

The United States shall guarantee to every State in this Union a Republican Form of Government * * *

Amendments to the U.S. Constitution

Amendment V (1791)

No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV. Section 1. (1868)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5 U.S.C.A. Section 702
(West Pub. Co. 2001)

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

---

7 U.S.C.A. Section 291
(West Pub. Co. 2001)

§ 291. Authorization of associations; powers [Capper-Volstead Act]

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

---

7 U.S.C.A. Section 292
(West Pub. Co. 2001)

§ 292. Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced,

and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

---

7 U.S.C.A. Section 601
(West Pub. Co. 2001)

§ 601. *Declaration of conditions* [AAA – Agricultural Adjustment Act of May 12, 1933, as amended]

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

---

7 U.S.C.A. Section 602
(West Pub. Co. 2001)

§ 602. *Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation*

It is declared to be the policy of Congress –

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which

has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title[1] such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as

---

[1] So in original. Probably should be followed by a comma.

will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

---

7 U.S.C. Section 613 (1999)

Section 613. Termination date; investigations and reports

This chapter shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended; and pending such time the President shall by proclamation terminate with respect to any basic agricultural commodity such provisions of this chapter as he finds are not requisite to carrying out the declared policy with respect to such commodity. In the case of sugar beets and sugarcane, the taxes provided by this chapter shall cease to be in effect, and the powers vested in the President or in the Secretary of Agriculture shall terminate on December 31, 1937 unless this chapter ceases to be in effect at an earlier date, as hereinabove provided. The Secretary of Agriculture shall make such investigations and reports thereon to the President as may be necessary to aid him in executing this section.

---

7 U.S.C.A. Section 1301
(West Pub. Co. 2001)

§ 1301. Definitions

(a) General definitions

For the purposes of this subchapter and the declaration of policy –

(1)(A) The "parity price" for any agricultural commodity, as of any date, shall be determined by multiplying the adjusted base price of such commodity as of such date by the parity index as of such date.

(B) The "adjusted base price" of any agricultural commodity, as of any date, shall be (i) the average of the prices received by farmers for such commodity, at such times as the Secretary may select during each year of the ten-year period ending on the 31st of December last before such date, or during each marketing season beginning in such period if the Secretary determines use of a calendar year basis to be impracticable, divided by (ii) the ratio of the general level of prices received by farmers for agricultural commodities during such period to the general level of prices received by farmers for agricultural commodities during the period January 1910 to December 1914, inclusive. As used in this subparagraph, the term "prices" shall include wartime subsidy payments made to producers under programs designed to maintain maximum prices established under the Emergency Price Control Act of 1942.

(C) The "parity index", as of any date, shall be the ratio of (i) the general level of prices for articles and services that farmers buy, wages paid hired farm labor,

interest on farm indebtedness secured by farm real estate, and taxes on farm real estate, for the calendar month ending last before such date to (ii) the general level of such prices, wages, rates, and taxes during the period January 1910 to December 1914, inclusive.

(D) The prices and indices provided for herein, and the data used in computing them, shall be determined by the Secretary, whose determination shall be final.

(E) Notwithstanding the provisions of subparagraph (A) of this paragraph, the transitional parity price for any agricultural commodity, computed as provided in this subparagraph, shall be used as the parity price for such commodity until such date after January 1, 1950, as such transitional parity price may be lower than the parity price, computed as provided in subparagraph (A) of this paragraph, for such commodity. The transitional parity price for any agricultural commodity as of any date shall be –

(i) its parity price determined in the manner used prior to the effective date of the Agricultural Act of 1948, less

(ii) 5 per centum of the parity price so determined multiplied by the number of full calendar years (not counting 1956 in the case of basic agricultural commodities) which, as of such date, have elapsed after January 1, 1949, in the case of non-basic agricultural commodities, and after January 1, 1955, in the case of the basic agricultural commodities.

(F) Notwithstanding the provisions of subparagraphs (A) and (E) of this paragraph, if the parity price

for any agricultural commodity, computed as provided in subparagraphs (A) and (E) of this paragraph, appears to be seriously out of line with the parity prices of other agricultural commodities, the Secretary may, and upon the request of a substantial number of interested producers shall, hold public hearings to determine the proper relationship between the parity price of such commodity and the parity prices of other agricultural commodities. Within sixty days after commencing such hearing the Secretary shall complete such hearing, proclaim his findings as to whether the facts require a revision of the method of computing the parity price of such commodity, and put into effect any revision so found to be required.

(G) Notwithstanding the foregoing provisions of this section, the parity price for any basic agricultural commodity, as of any date during the six-year period beginning January 1, 1950, shall not be less than its parity price computed in the manner used prior to October 31, 1949.

(2) "Parity", as applied to income, shall be that gross income from agriculture which will provide the farm operator and his family with a standard of living equivalent to those afforded persons dependent upon other gainful occupation. "Parity" as applied to income from any agricultural commodity for any year, shall be that gross income which bears the same relationship to parity income from agriculture for such year as the average gross income from such commodity for the preceding ten calendar years bears to the average gross income from agriculture for such ten calendar years.

(3) The term "interstate and foreign commerce" means sale, marketing, trade, and traffic between any State or Territory or the District of Columbia or Puerto Rico, and any place outside thereof; or between points within the same State or Territory or within the District of Columbia or Puerto Rico, through any place outside thereof; or within any Territory or within the District of Columbia or Puerto Rico.

(4) The term "affect interstate and foreign commerce" means, among other things, in such commerce, or to burden or obstruct such commerce or the free and orderly flow thereof; or to create or tend to create a surplus of any agricultural commodity which burdens or obstructs such commerce or the free and orderly flow thereof.

(5) The term "United States" means the several States and Territories and the District of Columbia and Puerto Rico.

(6) The term "State" includes a Territory and the District of Columbia and Puerto Rico.

(7) The term "Secretary" means the Secretary of Agriculture, and the term "Department" means the Department of Agriculture.

(8) The term "person" means an individual, partnership, firm, joint-stock company, corporation, association, trust, estate, or any agency of a State.

(9) The term "corn" means field corn.

(b) Definitions applicable to one or more commodities [Definitions applicable to tobacco only are omitted.]

For the purposes of this subchapter –

(1)(A) "Actual production" as applied to any acreage of corn means the number of bushels of corn which the local committee determines would be harvested as grain from such acreage if all the corn on such acreage were so harvested. In case of a disagreement between the farmer and the local committee as to the actual production of the acreage of corn on the farm, or in case the local committee determines that such actual production is substantially below normal, the local committee, in accordance with regulations of the Secretary, shall weigh representative samples of ear corn taken from the acreage involved, make proper deductions for moisture content, and determine the actual production of such acreage on the basis of such samples.

(B) "Actual production" of any number of acres of cotton, rice or peanuts on a farm means the actual average yield for the farm times such number of acres.

(2) "Bushel" means in the case of ear corn that amount of ear corn, including not to exceed 15 1/2 per centum of moisture content, which weighs seventy pounds, and in the case of shelled corn, means that amount of shelled corn including not to exceed 15 1/2 per centum of moisture content, which weighs fifty-six pounds.

(3)(A) "Carry-over", in the case of corn, rice, and peanuts for any marketing year shall be the quantity of the commodity on hand in the United States at the beginning of such marketing year, not including any quantity which was produced in the United States during the calendar year then current.

(B) "Carry-over" of cotton for any marketing year shall be the quantity of cotton on hand in the United States at the beginning of such marketing year, not including any part of the crop which was produced in the United States during the calendar year then current. * * *

(D) "Carry-over" of wheat, for any marketing year shall be the quantity of wheat on hand in the United States at the beginning of such marketing year, not including any wheat which was produced in the United States during the calendar year then current, and not including any wheat held by the Federal Crop Insurance Corporation under the Federal Crop Insurance Act [*7 U.S.C.A. § 1501* et seq.].

(4)(A) "Commercial corn-producing area" shall include all counties in which the average production of corn (excluding corn used as silage) during the ten calendar years immediately preceding the calendar year for which such area is determined, after adjustment for abnormal weather conditions, is four hundred and fifty bushels or more per farm and four bushels or more for each acre of farm land in the county.

(B) Whenever prior to February 1 of any calendar year the Secretary has reason to believe that any county which is not included in the commercial corn-producing area determined pursuant to the provisions of subparagraph (A) of this subsection, but which borders upon one of the counties in such area, or that any minor civil division in a county bordering on such area, is producing (excluding corn used for silage) an average of at least four hundred and fifty bushels of corn per farm and an average of at least four bushels for each acre of farm land

in the county or in the minor civil division, as the case may be, he shall cause immediate investigation to be made to determine such fact. If, upon the basis of such investigation, the Secretary finds that such county or minor civil division is likely to produce corn in such average amounts during such calendar year, he shall proclaim such determination, and, commencing with such calendar year, such county shall be included in the commercial corn-producing area. In the case of a county included in the commercial corn-producing area pursuant to this subparagraph, whenever prior to February 1 of any calendar year the Secretary has reason to believe that facts justifying the inclusion of such county are not likely to exist in such calendar year, he shall cause an immediate investigation to be made with respect thereto. If, upon the basis of such investigation, the Secretary finds that such facts are not likely to exist in such calendar year, he shall proclaim such determination, and commencing with such calendar year, such county shall be excluded from the commercial corn-producing area.

(5) "Farm consumption" of corn means consumption by the farmer's family, employees, or household, or by his work stock; or consumption by poultry or livestock on his farm if such poultry or livestock, or the products thereof, are consumed or to be consumed by the farmer's family, employees, or household.

(6)(A) "Market", in the case of corn, cotton, rice, tobacco, and wheat, means to dispose of, in raw or processed form, by voluntary or involuntary sale, barter, or exchange, or by gift inter vivos, and, in the case of corn and wheat, by feeding (in any form) to poultry or

livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of, but does not include disposing of any such commodities as premium to the Federal Crop Insurance Corporation under the Federal Crop Insurance Act [*7 U.S.C.A. § 1501* et seq.].

(B) "Marketed", "marketing", and "for market" shall have corresponding meanings to the term "market" in the connection in which they are used.

(C) "Market", in the case of peanuts, means to dispose of peanuts, including farmers' stock peanuts, shelled peanuts, cleaned peanuts, or peanuts in processed form, by voluntary or involuntary sale, barter, or exchange, or by gift inter vivos.

(7) "Marketing year" means, in the case of the following commodities, the period beginning on the first and ending with the second date specified below:

Corn, September 1-August 31;

Cotton, August 1-July 31;

Rice, August 1-July 31;

Tobacco (flue-cured), July 1-June 30;

Tobacco (other than flue-cured), October 1-September 30;

Wheat, June 1-May 31.

(8)(A) "National average yield" as applied to cotton or wheat shall be the national average yield per acre of the commodity during the ten calendar years in the case of wheat, and during the five calendar years in the case of cotton, preceding the year in which such national average

yield is used in any computation authorized in this subchapter, adjusted for abnormal weather conditions and, in the case of wheat, but not in the case of cotton, for trends in yields.

(B) "Projected national yield" as applied to any crop of wheat shall be determined on the basis of the national yield per harvested acre of the commodity during each of the five calendar years immediately preceding the year in which such projected national yield is determined, adjusted for abnormal weather conditions affecting such yield, for trends in yields and for any significant changes in production practices.

(9) "Normal production" as applied to any number of acres of corn or rice means the normal yield for the farm times such number of acres. "Normal production" as applied to any number of acres of cotton or wheat means the projected farm yield times such number of acres.

(10)(A) "Normal supply" in the case of corn, rice, wheat, and peanuts for any marketing year shall be (i) the estimated domestic consumption of the commodity for the marketing year ending immediately prior to the marketing year for which normal supply is being determined, plus (ii) the estimated exports of the commodity for the marketing year for which normal supply is being determined, plus (iii) an allowance for carry-over. The allowance for carry-over shall be the following percentage of the sum of the consumption and exports used in computing normal supply: 15 per centum in the case of corn; 10 per centum in the case of rice; 20 per centum in the case of wheat; and 15 per centum in the case of

peanuts. In determining normal supply the Secretary shall make such adjustments for current trends in consumption and for unusual conditions as he may deem necessary. * * *

(C) The "normal supply" of cotton for any marketing year shall be the estimated domestic consumption of cotton for the marketing year for which such normal supply is being determined, plus the estimated exports of cotton for such marketing year, plus, 30 per centum of the sum of such consumption and exports as an allowance for carry-over.

(11)(A) "Normal year's domestic consumption", in the case of corn and wheat, shall be the yearly average quantity of the commodity, wherever produced, that was cosumed[1] in the United States during the ten marketing years immediately preceding the marketing year in which such consumption is determined, adjusted for current trends in such consumption.

(B) "Normal year's domestic consumption", in the case of cotton and tobacco, shall be the yearly average quantity of the commodity produced in the United States that was consumed in the United States during the ten marketing years immediately preceding the marketing year in which such consumption is determined, adjusted for current trends in such consumption.

(C) "Normal year's domestic consumption", in the case of rice, shall be the yearly average quantity of rice produced in the United States that was consumed in the

---

[1] So in original. Probably should be "consumed".

United States during the five marketing years immediately preceding the marketing year in which such consumption is determined, adjusted for current trends in such consumption.

(12) "Normal year's exports" in the case of corn, cotton, rice, tobacco, and wheat shall be the yearly average quantity of the commodity produced in the United States that was exported from the United States during the ten marketing years (or, in the case of rice, the five marketing years) immediately preceding the marketing year in which such exports are determined, adjusted for current trends in such exports.

(13)(A) Repealed. Pub. L. 87-703, Title III, § 320(1), Sept. 27, 1962, 76 Stat. 625

(B) "Normal yield" for any county, in the case of peanuts, shall be the average yield per acre of peanuts for the county, adjusted for abnormal weather conditions, during the five calendar years immediately preceding the year in which such normal yield is determined. For 1942, the normal yield for any county, in the case of peanuts, shall be the average yield per acre for peanuts for the county, adjusted for abnormal conditions, during the years 1936-1940, inclusive, except that for any county in which the years 1935-1939, inclusive, are equally as representative, such period may be used in determining the normal yields for counties in the State.

(C) In applying subparagraph (A) or (B) of this paragraph, if for any such year the data are not available, or there is no actual yield, an appraised yield for such year, determined in accordance with regulations issued by the Secretary, shall be used as the actual yield for such

year. In applying such subparagraphs, if, on account of drought, flood, insect pests, plant disease, or other uncontrollable natural cause, the yield in any year of such ten-year period or five-year period, as the case may be, is less than 75 per centum of the average (computed without regard to such year) such year shall be eliminated in calculating the normal yield per acre.

(D) "Normal yield" for any county, in the case of rice and wheat, shall be the average yield per acre of rice or wheat, as the case may be, for the county during the five calendar years immediately preceding the year for which such normal yield is determined in the case of rice, or during the five years immediately preceding the year in which such normal yield is determined in the case of wheat, adjusted for abnormal weather conditions and for trends in yields. If for any such year data are not available, or there is no actual yield, an appraised yield for such year, determined in accordance with regulations issued by the Secretary, taking into consideration the yields obtained in surrounding counties during such year and the yield in years for which data are available, shall be used as the actual yield for such year.

(E) "Normal yield" for any farm, in the case of rice and wheat, shall be the average yield per acre of rice or wheat, as the case may be, for the farm during the five calendar years immediately preceding the year for which such normal yield is determined in the case of rice, or during the five years immediately preceding the year in which such normal yield is determined in the case of wheat, adjusted for abnormal weather conditions and for trends in yields. If for any such year the data are not available or there is no actual yield, then the normal yield

for the farm shall be appraised in accordance with regulations issued by the Secretary, taking into consideration abnormal weather conditions, trends in yields, the normal yield for the county, the yields obtained on adjacent farms during such year and the yield in years for which data are available.

(F) In applying subparagraphs (D) and (E) of this paragraph, if on account of drought, flood, insect pests, plant disease, or other uncontrollable natural cause, the yield for any year of such five-year period is less than 75 per centum of the average, 75 per centum of such average shall be substituted therefor in calculating the normal yield per acre. If, on account of abnormally favorable weather conditions, the yield for any year of such five-year period is in excess of 125 per centum of the average, 125 per centum of such average shall be substituted therefor in calculating the normal yield per acre.

(G) "Normal yield" for any farm, in the case of corn or peanuts, shall be the average yield per acre of corn or peanuts, as the case may be, for the farm, adjusted for abnormal weather conditions, during the five calendar years immediately preceding the year in which such normal yield is determined. For 1942, the normal yield for any farm, in the case of peanuts, shall be the average yield per acre of peanuts for the farm, adjusted for abnormal conditions, during the years 1936-1940, inclusive, except that for any county in which the years 1935-1939, inclusive, are equally as representative, such period may be used in determining normal yields for farms in the county. If for any such year the data are not available or there is no actual yield, then the normal yield for the farm shall be appraised in accordance with regulations of the

Secretary, taking into consideration abnormal weather conditions, the normal yield for the county, and the yield in years for which data are available.

(H) "Normal yield" for any county, for any crop of cotton, shall be the average yield per acre of cotton for the county, adjusted for abnormal weather conditions and any significant changes in production practices during the five calendar years immediately preceding the year in which the national marketing quota for such crop is proclaimed. If for any such year the data are not available, or there is no actual yield, an appraised yield for such year, determined in accordance with regulations issued by the Secretary, shall be used as the actual yield for such year.

(I) "Normal yield" for any farm, for any crop of cotton, shall be the average yield per acre of cotton for the farm, adjusted for abnormal weather conditions and any significant changes in production practices during the three calendar years immediately preceding the year in which such normal yield is determined. If for any such year the data are not available, or there is no actual yield, then the normal yield for the farm shall be appraised in accordance with regulations of the Secretary, taking into consideration abnormal weather conditions, the normal yield for the county, changes in production practices, and the yield in years for which data are available.

(J) "Projected county yield" for any crop of wheat shall be determined on the basis of the yield per harvested acre of such commodity in the county during each of the five calendar years immediately preceding the year in which such projected county yield is determined, adjusted for abnormal weather conditions affecting such

yield, for trends in yields and for any significant changes in production practices.

(K) "Projected farm yield" for any crop of wheat shall be determined on the basis of the yield per harvested acre of such commodity on the farm during each of the three calendar years immediately preceding the year in which such projected farm yield is determined, adjusted for abnormal weather conditions affecting such yield, for trends in yields and for any significant changes in production practices, but in no event shall such projected farm yield be less than the normal yield for such farm as provided in subparagraph (E) of this paragraph.

(L) "Projected national, State, and county yields" for any crop of cotton shall be determined on the basis of the yield per harvested acre of such crop in the United States, the State and the county, respectively, during each of the five calendar years immediately preceding the year in which such projected yield for the United States, the State, and the county, respectively, is determined, adjusted for abnormal weather conditions affecting such yield, for trends in yields, and for any significant changes in production practices.

(M) "Projected farm yield" for any crop of cotton shall be determined on the basis of the yield per harvested acre of such crop on the farm during each of the three calendar years immediately preceding the year in which such projected farm yield is determined, adjusted for abnormal weather conditions affecting such yield, for trends in yields, and for any significant changes in production practices, but in no event shall such projected

farm yield be less than the normal yield for such farm as provided in subparagraph (I) of this paragraph.

(14)(A) "Reserve supply level", in the case of corn, shall be a normal year's domestic consumption and exports of corn plus 10 per centum of a normal year's domestic consumption and exports, to insure a supply adequate to meet domestic consumption and export needs in years of drought, flood, or other adverse conditions, as well as in years of plenty. * * *

(16)(A) "Total supply" of wheat, corn, rice, and peanuts for any marketing year shall be the carry-over of the commodity for such marketing year, plus the estimated production of the commodity in the United States during the calendar year in which such marketing year begins and the estimated imports of the commodity into the United States during such marketing year. * * *

(C) "Total supply" of cotton for any marketing year shall be the carry-over at the beginning of such marketing year, plus the estimated production of cotton in the United States during the calendar year in which such marketing year begins and the estimated imports of cotton into the United States during such marketing year. * * *

(c) Use of Federal statistics

The latest available statistics of the Federal Government shall be used by the Secretary in making the determinations required to be made by the Secretary under this chapter.

(d) Exclusion of stocks of certain commodities

In making any determination under this chapter or under the Agricultural Act of 1949 [7 U.S.C.A. § 1421 et seq.] with respect to the carryover of any agricultural commodity, the Secretary shall exclude from such determination the stocks of any commodity acquired pursuant to, or under the authority of, the Strategic and Critical Materials Stock Piling Act (60 Stat. 596) [50 U.S.C.A. § 98 et seq.].

---

7 U.S.C.A. Section 1303
(West Pub. Co. 2001)

§ 1303. Parity payments

If and when appropriations are made therefor, the Secretary is authorized and directed to make payments to producers of corn, wheat, cotton, rice, or tobacco, on their normal production of such commodities in amounts which, together with the proceeds thereof, will provide a return to such producers which is as nearly equal to parity price as the funds so made available will permit. All funds available for such payments with respect to these commodities shall, unless otherwise provided by law, be apportioned to these commodities in proportion to the amount by which each fails to reach the parity income. Such payments shall be in addition to and not in substitution for any other payments authorized by law.

---

7 U.S.C.A. Section 5671
(West Pub. Co. 2001)

§ 5671. Agricultural embargo protection

(a) Prerequisites; scope of compensation

Notwithstanding any other provision of law, if –

(1) the President or other member of the executive branch of the Federal Government causes the export of any agricultural commodity to any country or area of the world to be suspended or restricted for reasons of national security or foreign policy under the Export Administration Act of 1979 (50 U.S.C. App. 2401 et seq.) or under any provision of law;

(2) such suspension or restriction of the export of such agricultural commodity is imposed other than in connection with a suspension or restriction of all exports from the United States to such country or area of the world; and

(3) sales of such agricultural commodity for export from the United States to such country or area of the world during the year preceding the year in which the suspension or restriction is imposed exceeds 3 percent of the total sales of such commodity for export from the United States to all foreign countries during the year preceding the year in which the suspension or restriction is in effect;

the Secretary shall compensate producers of the commodity involved by making payments available to such producers, as provided in subsection (b) of this section.

(b) Amount of payments

If the Secretary makes payments available to producers under subsection (a) of this section, the amount of such payment shall be determined –

(1) in the case of an agricultural commodity for which payments are authorized to be made to producers under Title I of the Agricultural Act of 1949 (7 U.S.C. 1441 et seq.), by multiplying –

(A) the farm program payment yield for the producer or the yield established for the farm for the commodity involved; by

(B) the crop acreage base established for the commodity; by

(C) the amount by which the average market price per unit of such commodity received by producers during the 60-day period immediately following the date of the imposition of the suspension or restriction is less than 100 percent of the parity price for such commodity, as determined by the Secretary on the date of the imposition of the suspension or restriction; or

(2) in the case of other agricultural commodities for which price support is authorized for producers under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), by multiplying the amount by which the average market price per unit of such commodity received by the producers during the 60-day period immediately following the date of the imposition of the suspension or restriction is less than 100 percent of the parity price for such commodity, as determined by the Secretary on the date of the imposition of the suspension or restriction, by the

quantity of such commodity sold by the producer during the period that the suspension or restriction is in effect.

(c) Time for payments

Payments under paragraph (1) of subsection (b) of this section shall be made for each marketing year or part thereof during which the suspension or restriction is in effect and shall be made in equal amounts at 90-day intervals, beginning 90 days after the date of the imposition of the suspension or restriction.

(d) Commodity Credit Corporation

The Secretary shall use the Commodity Credit Corporation in carrying out the provisions of this section.

(e) Regulations

The Secretary may issue such regulations as are determined necessary to carry out this section.

---

7 U.S.C.A. Section 7301
(West Pub. Co. 2001)

§ 7301. Suspension and repeal of permanent price support authority ["Freedom to Farm" Act of 1996]

(a) Agricultural Adjustment Act of 1938

(1) Suspensions

The following provisions of the Agricultural Adjustment Act of 1938 [7 U.S.C.A. § 1281 et seq.] shall not be applicable to the 1996 through 2002 crops of loan commodities, peanuts, and sugar and shall not be applicable

to milk during the period beginning on April 4, 1996, and ending on December 31, 2002:

(A) Parts II through V of subtitle B of title III (7 U.S.C. 1326- *1351).*

(B) Subsections (a) through (j) of section 358 (7 U.S.C. 1358).

(C) Subsections (a) through (h) of section 358a (7 U.S.C. 1358a).

(D) Subsections (a), (b), (d), and (e) of section 358d (7 U.S.C. 1359).

(E) Part VII of subtitle B of title III (7 U.S.C. 1359aa-*1359jj).*

(F) In the case of peanuts, part I of subtitle C of title III (7 U.S.C. 1361-1368).

(G) In the case of upland cotton, section 377 (7 U.S.C. 1377).

(H) Subtitle D of title III (7 U.S.C. 1379a-1379j).

(I) Title IV (7 U.S.C. 1401-1407).

(2) Omitted

(b) Agricultural Act of 1949

(1) Suspensions

The following provisions of the Agricultural Act of 1949 [7 U.S.C.A § 1421 et seq.] shall not be applicable to the 1996 through 2002 crops of loan commodities, peanuts, and sugar and shall not be applicable to milk during the period beginning on April 4, 1996, and ending on December 31, 2002:

(A) Section 101 (7 U.S.C. 1441).

(B) Section 103(a) (7 U.S.C. 1444(a)).

(C) Section 105 (7 U.S.C. 1444b).

(D) Section 107 (7 U.S.C. 1445a).

(E) Section 110 (7 U.S.C. 1445e).

(F) Section 112 (7 U.S.C. 1445g).

(G) Section 115 (7 U.S.C. 1445k).

(H) Section 201 (7 U.S.C. 1446).

(I) Title III (7 U.S.C. 1447-1449).

(J) Title IV (7 U.S.C. 1421-1433d), other than sections 404, 412, and 416 (7 U.S.C. 1424, 1429, and 1431).

(K) Title V (7 U.S.C. 1461-1469).

(L) Title VI (7 U.S.C. 1471-1471j).

(2) Repeals

The following provisions of the Agricultural Act of 1949 [7 U.S.C.A. § 1421 et seq.] are repealed:

(A) Section 101B (7 U.S.C. 1441-2).

(B) Section 103B (7 U.S.C. 1444-2).

(C) Section 105B (7 U.S.C. 1444f).

(D) Section 107B [7 U.S.C.A. § 1445b-3a].

(E) Section 108B (7 U.S.C. 1445c-3).

(F) Section 113 (7 U.S.C. 1445h).

(G) Subsections (b) and (c) of section 114 (7 U.S.C. 1445j).

(H) Sections 205, 206, and 207 (7 U.S.C. 1446f, 1446g, and 1446h).

(I) Sections 406 and 427 (7 U.S.C. 1426 and 1433f).

(3) Omitted

(c) Suspension of certain quota provisions

The joint resolution entitled "A joint resolution relating to corn and wheat marketing quotas under the Agricultural Adjustment Act of 1938, as amended", approved May 26, 1941 (7 U.S.C. 1330 and 1340), shall not be applicable to the crops of wheat planted for harvest in the calendar years 1996 through 2002.

---

12 U.S.C.A. Section 225a
(West Pub. Co. 2001)

§ 225a. Maintenance of long run growth of monetary and credit aggregates

The Board of Governors of the Federal Reserve System and the Federal Open Market Committee shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.

---

12 U.S.C.A. Section 241
(West Pub. Co. 2001)

§ 241. Creation; membership; compensation and expenses

The Board of Governors of the Federal Reserve System (hereinafter referred to as the "Board") shall be composed of seven members, to be appointed by the President, by and with the advice and consent of the Senate, after August 23, 1935, for terms of fourteen years except as hereinafter provided * * * In selecting the members of the Board, not more than one of whom shall be selected from any one Federal Reserve district, the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country. The members of the Board shall devote their entire time to the business of the Board * * *

---

12 U.S.C.A. Section 355
(West Pub. Co. 2001)

§ 355. Purchase and sale of obligations of National, State, and municipal governments; open market operations; purchases and sales from or to United States; maximum aggregate amount of obligations acquired directly from or loaned directly to United States

Every Federal Reserve bank shall have power:

(1) To buy and sell, at home or abroad, bonds and notes of the United States, bonds issued under the provisions of subsection (c) of section 1463 of this title and

having maturities from date of purchase of not exceeding six months, and bills, notes, revenue bonds, and warrants with a maturity from date of purchase of not exceeding six months, issued in anticipation of the collection of taxes or in anticipation of the receipt of assured revenues by any State, county, district, political subdivision, or municipality in the continental United States, including irrigation, drainage and reclamation districts, and obligations of, or fully guaranteed as to principal and interest by, a foreign government or agency thereof, such purchases to be made in accordance with rules and regulations prescribed by the Board of Governors of the Federal Reserve System. Notwithstanding any other provision of this chapter, any bonds, notes, or other obligations which are direct obligations of the United States or which are fully guaranteed by the United States as to principal and interest may be bought and sold without regard to maturities but only in the open market.

(2) To buy and sell in the open market, under the direction and regulations of the Federal Open Market Committee, any obligation which is a direct obligation of, or fully guaranteed as to principal and interest by, any agency of the United States.

---

15 U.S.C. Section 1
(1999)

Section 1. Trusts, etc., in restraint of trade illegal; penalty [Sherman Anti-Trust Act of 1890, as amended]

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

---

15 U.S.C.A. Section 18
(West Pub. Co. 2001)

§ 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may

be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to

the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture

under any statutory provision vesting such power in such Commission, Board, or Secretary.

---

15 U.S.C.A. Section 1022c
(West Pub. Co. 2001)

§ 1022c. Inclusion of priority policies and programs in President's Budget

To contribute to the achievement of the goals under the Full Employment and Balanced Growth Act of 1978 [15 U.S.C.A. § 3101 et seq.], the President's Budget for each fiscal year beginning after October 27, 1978, shall include priority policies and programs, which shall include, to the extent deemed appropriate by the President, consideration of the following – * * *

(C) development of a comprehensive national agricultural policy that assures –

(i) production levels adequate to meet the nutritional needs of all Americans and respond to rising food requirements throughout the world;

(ii) farm and ranch income *at full parity levels* that will improve opportunities for farm families, encourage production, provide for essential capital investment in farming, and provide for farm prices *at full parity* in the market place;

(iii) renewed commitment to the protection and conservation of rural land and water through support for improved conservation practices and research, and attention to agricultural land use in the formulation of plans

for energy, water and mineral resources, transportation, and commercial, industrial, and residential development; and

(iv) support for programs and public services designed to respond to the unique economic and social conditions of rural communities; * * *

(G) national defense and other needed international programs; * * *

(I) proper attention to balancing the Federal budget;

(J) proper attention to the dislocation of jobs caused by Federal laws, regulations, and policies;

(K) policies and programs designed to increase exports and improve the international competitive position of *agriculture*, business, and industry, including measures to promote a free and fair international trading system, a sound and stable international monetary system and innovation in *agriculture*, business, and industry;

(L) such other priority policies and programs as the President deems appropriate. [Emphases added.]

---

19 U.S.C. Section 1351
(1999)

Section 1351. Foreign trade agreements

(a) Authority of President; modification and decrease of duties; altering import restrictions

(1) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time –

(A) To enter into foreign trade agreements with foreign governments or instrumentalities thereof: Provided, That the enactment of the Trade Agreements Extension Act of 1955 shall not be construed to determine or indicate the approval or disapproval by the Congress of the executive agreement known as the General Agreement on Tariffs and Trade.

(B) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.

(2) No proclamation pursuant to paragraph (1)(B) of this subsection shall be made –

(A) Increasing by more than 50 per centum any rate of duty existing on July 1, 1934; except that a specific rate of duty existing on July 1, 1934, may be converted to its ad valorem equivalent based on the value of imports of the article concerned during the calendar year 1934 (determined in the same manner as provided in subparagraph (D)(ii)) and the proclamation may provide an ad valorem rate of duty not in excess of 50 per centum above such ad valorem equivalent.

(B) Transferring any article between the dutiable and free lists. * * *

(E) In order to carry out a foreign trade agreement entered into by the President on or after July 1, 1958, decreasing any rate of duty below the lowest of the rates provided for in paragraph (4)(A) of this subsection. * * *

(4)(A) No proclamation pursuant to paragraph (1)(B) of this subsection shall be made, in order to carry out a foreign trade agreement entered into by the President on or after July 1, 1958, decreasing any rate of duty below the lowest of the following rates:

(i) The rate which would result from decreasing the rate existing on July 1, 1958, by 20 per centum of such rate.

(ii) Subject to paragraph (2)(B) of this subsection, the rate 2 per centum ad valorem below the rate existing on July 1, 1958.

(iii) The rate 50 per centum ad valorem or, in the case of any article subject to a specific rate of duty or to a combination of rates including a specific rate, any rate (or combination of rates), however

stated, the ad valorem equivalent of which has been determined as 50 per centum ad valorem.

The provisions of clauses (ii) and (iii) of this subparagraph and of subparagraph (B)(ii) of this paragraph shall, in the case of any article, subject to a combination of ad valorem rates of duty, apply to the aggregate of such rates; and, in the case of any article, subject to a specific rate of duty or to a combination of rates including a specific rate, such provisions shall apply on the basis of the ad valorem equivalent of such rate or rates, during a representative period (whether or not such period includes July 1, 1958), determined in the same manner as the ad valorem equivalent of rates not stated wholly in ad valorem terms is determined for the purpose of paragraph (2)(D)(ii) of this subsection. * * *

(5) Repealed. Pub. L. 87-794, title II, Sec. 257(b), Oct. 11, 1962, 76 Stat. 882.

(6) The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

(b) Cuba; preferential customs treatment; decrease of rates [Omitted] * * * *

(c) Definitions

(1) As used in this section, the term "duties and other import restrictions" includes (A) rate and form of import duties and classification of articles, and (B) limitations, prohibitions, charges, and exactions other than duties, imposed on importation or imposed for the regulation of imports. * * *

(d) Rate basis for additional increases or decreases; restoration of terminated treaties forbidden

(1) When any rate of duty has been increased or decreased for the duration of war or an emergency,

by agreement or otherwise, any further increase or decrease shall be computed upon the basis of the post-war or post-emergency rate carried in such agreement or otherwise.

(2) Where under a foreign trade agreement the United States has reserved the unqualified right to withdraw or modify, after the termination of war or an emergency, a rate on a specific commodity, the rate on such commodity to be considered as "existing on January 1, 1945" for the purpose of this section shall be the rate which would have existed if the agreement had not been entered into.

(3) No proclamation shall be made pursuant to this section for the purpose of carrying out any foreign trade agreement the proclamation with respect to which has been terminated in whole by the President prior to July 5, 1945.

(e) Repealed. Pub. L. 87-794, title II, Sec. 257(b), Oct. 11, 1962, 76 Stat. 882

(f) Information and advice from industry, agriculture, and labor It is declared to be the sense of the Congress that the President, during the course of negotiating any foreign trade agreement under this section, should seek information and advice with respect to such agreement from representatives of industry, agriculture, and labor. [Emphasis added.]

---

28 U.S.C. Section 1254 (1999)

Section 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

---

28 U.S.C.A. Section 1331
(West Pub. Co. 2001)

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

---

28 U.S.C.A. Section 1491

(West Pub. Co. 2001)

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied

contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

(b)(1) Both the Unites[1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded. * * *

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

---

[1] So in original.

28 U.S.C.A. Section 2401
(West Pub. Co. 2001)

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

---

28 U.S.C.A. Section 2409a
(West Pub. Co. 2001)

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections

7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section. * * *

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which

it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review. * * *

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

---

31 U.S.C.A. Section 5301
(West Pub. Co. 2001)

§ 5301. Buying obligations of the United States Government

(a) The President may direct the Secretary of the Treasury to make an agreement with the Federal reserve banks and the Board of Governors of the Federal Reserve System when the President decides that the foreign commerce of the United States is affected adversely because –

(1) the value of coins and currency of a foreign country compared to the present standard value of gold is depreciating;

(2) action is necessary to regulate and maintain the parity of United States coins and currency;

(3) an economic emergency requires an expansion of credit; or

(4) an expansion of credit is necessary so that the United States Government and the governments of other countries can stabilize the value of coins and currencies of a country.

(b) Under an agreement under subsection (a) of this section, the Board shall permit the banks (and the Board is authorized to permit the banks notwithstanding another law) to agree that the banks will –

(1) conduct through each entire specified period open market operations in obligations of the United States Government or corporations in which the Government is the majority stockholder; and

(2) buy directly and hold an additional $3,000,000,000 of obligations of the Government for each agreed period, unless the Secretary consents to the sale of the obligations before the end of the period.

(c) With the approval of the Secretary, the Board may require Federal reserve banks to take action the Secretary and Board consider necessary to prevent unreasonable credit expansion.

---

31 U.S.C.A. Section 5302
(West Pub. Co. 2001)

§ 5302. Stabilizing exchange rates and arrangements

(a)(1) The Department of the Treasury has a stabilization fund. The fund is available to carry out this section, section 18 of the Bretton Woods Agreement Act (22 U.S.C. 286e-3), and section 3 of the Special Drawing Rights Act (22 U.S.C. 286o), and for investing in obligations of the United States Government those amounts in the fund the Secretary of the Treasury, with the approval of the President, decides are not required at the time to carry out this section. Proceeds of sales and investments, earnings, and interest shall be paid into the fund and are available to carry out this section. However, the fund is not available to pay administrative expenses.

(2) Subject to approval by the President, the fund is under the exclusive control of the Secretary, and may not be used in a way that direct control and custody pass from the President and the Secretary. Decisions of the Secretary are final and may not be reviewed by another officer or employee of the Government.

(b) Consistent with the obligations of the Government in the International Monetary Fund on orderly exchange arrangements and a stable system of exchange rates, the Secretary or an agency designated by the Secretary, with the approval of the President, may deal in gold, foreign exchange, and other instruments of credit and securities the Secretary considers necessary. However, a loan or credit to a foreign entity or government of a foreign country may be made for more than 6 months in any 12-

month period only if the President gives Congress a written statement that unique or emergency circumstances require the loan or credit be for more than 6 months.

(c)(1) By the 30th day after the end of each month, the Secretary shall give the Committee on Banking, Finance and Urban Affairs of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate a detailed financial statement on the stabilization fund showing all agreements made or renewed, all transactions occurring during the month, and all projected liabilities.

(2) The Secretary shall report each year to the President and Congress on the operation of the fund.

(d) A repayment of any part of the first subscription payment of the Government to the International Monetary Fund, previously paid from the stabilization fund, shall be deposited in the Treasury as a miscellaneous receipt.

[Note: Former Mexican Debt Disclosure Act of April 10, 1995, Pub. L. No. 104-6, Section 401 et seq., was codified following 31 U.S.C. Section 5302, but the presidential reporting requirement enacted there expired automatically when Mexico repaid the last of its Exchange Stabilization Fund assistance on January 15, 1997.]

---

31 U.S.C.A. Section 5304
(West Pub. Co. 2001)

§ 5304. Regulations

With the approval of the President, the Secretary of the Treasury may prescribe regulations –

(1) to carry out section 5301 of this title; and

(2) the Secretary considers necessary to carry out section 5302 of this title.

---

50 U.S.C.A. Section 1701
(West Pub. Co. 2001)

§ 1701. Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of

national emergency which must be with respect to such threat.

---

50 U.S.C.A. Section 1702
(West Pub. Co. 2001)

§ 1702. Presidential authorities

(a)(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise –

(A) investigate, regulate, or prohibit –

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.

(b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly –

(1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value;

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances; or

(3) the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 2404 of the Appendix to this title, or under section 2405 of the Appendix to this title to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of Title 18;

(4) any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and

arrangement or facilitation of such travel including non-scheduled air, sea, or land voyages.

---

50 U.S.C.A. Section 1703
(West Pub. Co. 2001)

§ 1703. Consultation and reports

(a) Consultation with Congress

The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised.

(b) Report to Congress upon exercise of Presidential authorities

Whenever the President exercises any of the authorities granted by this chapter, he shall immediately transmit to the Congress a report specifying –

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;

(3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

(4) why the President believes such actions are necessary to deal with those circumstances; and

(5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

(c) Periodic follow-up reports

At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) of this section with respect to an exercise of authorities under this chapter, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b) of this section.

(d) Supplemental requirements

The requirements of this section are supplemental to those contained in title IV of the National Emergencies Act [50 U.S.C.A. § 1641].

---

50 U.S.C.A. Section 1704
(West Pub. Co. 2001)

§ 1704. Authority to issue regulations

The President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this chapter.

---

50 U.S.C.A. Section 1706
(West Pub. Co. 2001)

§ 1706. Savings provisions

(a) Termination of national emergencies pursuant to National Emergencies Act

(1) Except as provided in subsection (b) of this section, notwithstanding the termination pursuant to the National Emergencies Act [50 U.S.C.A. § 1601 et seq.] of a national emergency declared for purposes of this chapter, any authorities granted by this chapter, which are exercised on the date of such termination on the basis of such national emergency to prohibit transactions involving property in which a foreign country or national thereof has any interest, may continue to be so exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(2) Notwithstanding the termination of the authorities described in section 101(b) of this Act, any such authorities, which are exercised with respect to a country on the date of such termination to prohibit transactions involving any property in which such country or any national thereof has any interest, may continue to be exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(b) Congressional termination of national emergencies by concurrent resolution

The authorities described in subsection (a)(1) of this section may not continue to be exercised under this section if the national emergency is terminated by the Congress by concurrent resolution pursuant to section 202 of the National Emergencies Act [50 U.S.C.A § 1622] and if the Congress specifies in such concurrent resolution that such authorities may not continue to be exercised under this section.

(c) Supplemental savings provisions; supersedure of inconsistent provisions

(1) The provisions of this section are supplemental to the savings provisions of paragraphs (1), (2), and (3) of section 101(a) [50 U.S.C.A. § 1601(a)(1), (2), (3)] and of paragraphs (A), (B), and (C) of section 202(a) [50 U.S.C.A. § 1622(a)(A), (B), and (C)] of the National Emergencies Act.

(2) The provisions of this section supersede the termination provisions of section 101(a) [50 U.S.C.A. § 1601(a)] and of title II [50 U.S.C.A. § 1621 et seq.] of the National Emergencies Act to the extent that the provisions of this section are inconsistent with these provisions.

(d) Periodic reports to Congress

If the President uses the authority of this section to continue prohibitions on transactions involving foreign property interests, he shall report to the Congress every six months on the use of such authority.

UNITED STATES SUPREME COURT
WHITMAN v. AMERICAN TRUCKING ASSOCIATIONS, INC.,
531 U.S. 457, 121 S.Ct. 903, 919-920 (2001)
(entire concurrence of Thomas, J.).

Justice THOMAS, concurring.

I agree with the majority that § 109's directive to the agency is no less an "intelligible principle" than a host of other directives that we have approved. *Ante,* at [121 S.Ct. 903,] 912-914. I also agree that the Court of Appeals' remand to the agency to make its own corrective interpretation does not accord with our understanding of the delegation issue. *Ante,* at 912. I write separately, however, to express my concern that there may nevertheless be a genuine constitutional problem with § 109, a problem which the parties did not address.

The parties to these cases who briefed the constitutional issue wrangled over constitutional doctrine with barely a nod to the [920] text of the Constitution. Although this Court since 1928 has treated the "intelligible principle" requirement as the only constitutional limit on congressional grants of power to administrative agencies, see *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928), the Constitution does not speak of "intelligible principles." Rather, it speaks in much simpler terms: "*All* legislative Powers herein granted shall be vested in a Congress." U.S. Const., Art. 1, § 1 (emphasis added). I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great

for the decision to be called anything other than "legislative."

As it is, none of the parties to these cases has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.